



THE INDIAN LAW REPORTS.

MADRAS SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT MADRAS
AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THAT COURT.

REPORTED BY

Privy Council	J V WOODMAN, <i>Middle Temple.</i>
High Court	D CHAMIER, <i>Inner Temple.</i>

VOL. XXV.—1902.

JANUARY—DECEMBER.

Published under the Authority of the Governor-General in Council,
BY THE BOOK DEPOT BRANCH OF THE LEGISLATIVE DEPARTMENT OF THE BENGAL SECRETARIAT, CALCUTTA;
THE SUPERINTENDENT, GOVERNMENT PRESS, MADRAS;
THE SUPERINTENDENT, GOVERNMENT CENTRAL PRESS, BOMBAY;
AND THE GOVERNMENT BOOK DEPOT, ALLAHABAD.

MADRAS

PRINTED BY THE SUPERINTENDENT, GOVERNMENT PRESS

JUDGES OF THE HIGH COURT.

1st JANUARY—31st DECEMBER 1902.

CHIEF JUSTICE.

The Hon'ble Sir CHARLES ARNOLD WHITE, *Kt.*

PUISNE JUDGES.

The Hon'ble Sir S. SUBRAHMANYA AYYAR, K.C.I.E. (*Returned
from leave on 8th October 1902*).

The Hon'ble Mr. J. A. DAVIES.

The Hon'ble Mr. R. S. BENSON.

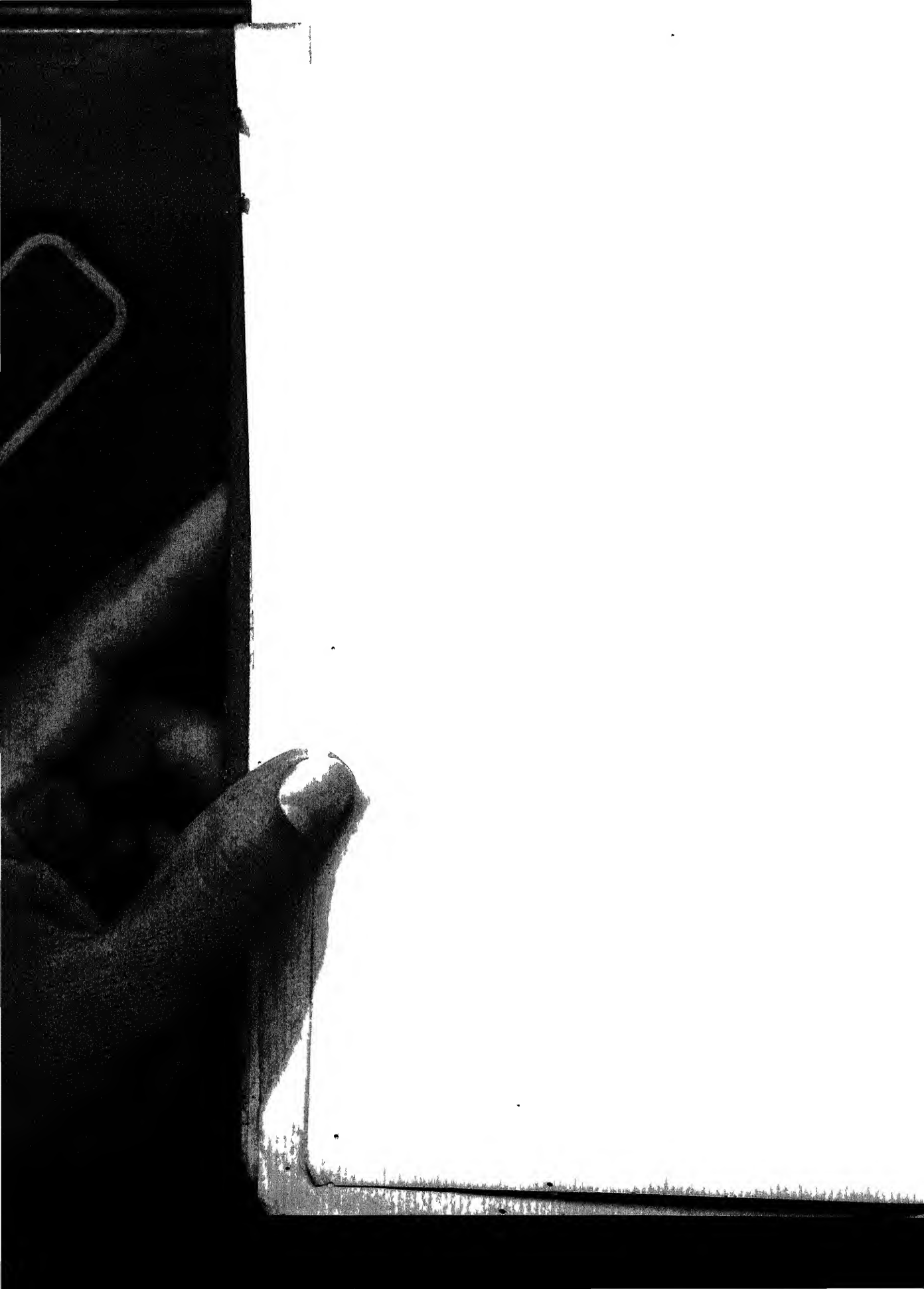
The Hon'ble Mr. H. T. BODDAM.

The Hon'ble Sir V. BHASHYAM AYYANGAR, *Kt*, C.I.E.

The Hon'ble Mr. L. MOORE (*Offg. till 7th October 1902*)

ADVOCATE-GENERAL.

The Hon'ble Mr. J. E. P. WALLIS.



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THE
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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr Justice Bhashyam Ayyangar.

CHINNAPPA REDDI (DEFENDANT No 4), APPELLANT,

v.

MANICKAVASAGAM CHIETTI (PLAINTIFF), RESPONDENT.*

1901
August 2, 5

Registration Act—Act III of 1877, ss. 18, 50—Document of which registration is optional—Priority of subsequent registered document over prior unregistered document—Notice of prior document—Onus of alleging and proving notice

To check fraud, priority is not given by the Courts, in cases to which section 50 of the Registration Act applies, to the holder of a later registered mortgage, if he, at the time when he obtained his mortgage, had notice of an earlier one. But the onus lies on the party alleging such knowledge or notice, to aver it in his pleadings and to prove it.

Suri by a mortgagee, for the sale of the mortgaged property. The plaint alleged that a mortgage deed had been executed by first defendant and attested by third defendant in plaintiff's favour for Rs 34 on 21st August 1891, by the terms of which the principal sum borrowed, together with interest due thereon, was to be repaid on 12th July 1892, and that, in default, the principal and interest should be paid on demand. No payments had been made. First defendant was described as the head of the family, defendants Nos. 2 and 3 being his undivided sons; and the money was alleged to have been advanced for family expenses. The deed of mortgage had not been registered. Fourth defendant was impleaded because he held a mortgage deed over the same property, subsequent in date to plaintiff's, and had obtained a decree upon it. The plaint

* Second Appeal No. 178 of 1900 against the decree of J. W. F. Dumergue, District Judge of Tinnevely, in Appeal Suit No 493 of 1898, affirming the decree of V. Mallari, District Munsif of Tuticorin, in Original Suit No. 598 of 1898.

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contained no allegation that fourth defendant had taken his mortgage with notice of plaintiff's mortgage. Fourth defendant, in his statement, pleaded that plaintiff's mortgage, even if genuine, (as to which he was ignorant), could not bind him. He admitted that his mortgage was subsequent in date to plaintiff's, but claimed that as his deed had been registered and plaintiff's had not, his should take preference to plaintiff's. He had obtained a decree for Rs. 64 on his mortgage and asked for a decree ordering the mortgaged property to be sold so as to give him the preference, or that the property might be exonerated from plaintiff's claim. He did not plead that he had taken his mortgage without knowledge of plaintiff's previous charge.

The Munsif held that plaintiff's mortgage was genuine and that it was binding on defendants Nos. 2 and 3 as well as on first defendant. With regard to fourth defendant's claim he held that as he had not claimed to have obtained his mortgage without notice of plaintiff's encumbrance he was not entitled to priority, and referred to *Krishnamma v. Suranna*(1). He passed a decree against defendants Nos. 1, 2 and 3 for the amount of the mortgage debt, and, in default of payment within six months, for the sale of the property under plaintiff's mortgage.

The District Judge, on appeal, said :—"The fourth defendant never alleged that he had no notice of the prior unregistered encumbrance and the fact that he disputed its genuineness in his written statement without contending that he was unaware of it shows that this appeal is the result of an afterthought. Under these circumstances, it must be held that the fourth defendant had notice and that the plaintiff's title ought not to be defeated." He dismissed the appeal.

Defendant No. 4 preferred this second appeal.

V. Krishnasami Ayyangar for appellant.

Sundara Ayyar for respondent.

JUDGMENT.—The law gives the holder of a registered mortgage priority over an unregistered mortgage though the latter may be of earlier date. This Court, following the English decisions, has held that, in order to check fraud under cover of this provision of law, such priority cannot be claimed if the subsequent mortgagee, at the time of obtaining his mortgage, had notice of the earlier

(1) I.L.R., 16 Mad., 148.

mortgage. The onus is upon the party alleging such knowledge or notice to aver the same in his pleadings and to prove it. This the plaintiff did not do. He made no allegation in his plaint, nor at the settlement of issues, that the fourth defendant had notice of the plaintiff's mortgage and it cannot be properly presumed that fourth defendant had such notice from the fact of his not having denied in his written statement what was not alleged by the plaintiff.

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We must set aside the decrees of both the Courts below with costs throughout. With the consent of the parties before us the property will be sold free from both plaintiff's and fourth defendant's mortgages and the net proceeds will be applied first towards discharge of fourth defendant's mortgage debt and the costs of the present litigation, and the balance, if any, will be applied to the discharge of the plaintiff's mortgage debt, and the surplus, if any, will be paid to defendants Nos. 1 to 3.

APPELLATE CIVIL.

*Before Mr. Justice Davies, Mr. Justice Bhashyam Ayyangar,
and Mr. Justice Moore.*

REFERENCE UNDER STAMP ACT, SECTION 57.*

1901.
August 9.

Stamp Act—Act II of 1899, s. 5, Sched. I, art. 31—Lease for three years containing covenant by lessor to renew at option of lessee for further term of one or two years from expiration of original term—Stamp duty—Not an instrument comprising or relating to several distinct matters

A lease for three years at a specified rent containing a covenant on the part of the lessor to renew it, at the option of the lessee, for a further period of one or two years from the expiration of the original term, is not an instrument comprising or relating to several distinct matters within the meaning of section 5 of the Stamp Act, 1899. Such an instrument contains but one contract, namely, a demise. The option to renew is ancillary to and forms part of the consideration for entering into the lease.

CASE referred under section 57 of the Stamp Act for the opinion of the High Court as to the stamp duty chargeable on a lease.

* Referred Case No. 9 of 1901, stated under section 57 of the Stamp Act, by R. A. Graham, Secretary to the Commissioner of Salt, Abkari and Separate Revenue, Board of Revenue, Madras, in letter dated 19th July 1901.

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The lease was in respect of a house situated in Nungambakam, and by it the lessee agreed, among other things, to pay a monthly rent of Rs. 190 for a period of three years, in consideration of the lessor demising the premises for that period; it also contained the following covenant—"And that, if the lessee, his heirs, executors, or assigns, shall be desirous of taking a renewed lease of the said premises for the further term of one or two years from the expiration of the said term hereby granted and of such desire shall prior to the expiration of the said last-mentioned term give to the lessor, her executors, administrators, or assigns, or her or their agents in Madras for the time being six calendar months previous notice in writing and shall pay the said rent hereby reserved and observe and perform the several covenants and agreements herein contained and on the part of the lessee, his executors, administrators, or assigns to be observed and performed up to the expiration of the said term hereby granted, she, the lessor, her heirs, executors, administrators, or assigns, will upon the request and at the expense of the lessee, his executors, administrators, or assigns, and upon his or their executing or delivering to the lessor, her executors, administrators, or assigns, a counter-part thereof, forthwith execute and deliver to the lessee, his executors, administrators, or assigns, a renewed lease of the said premises for the further term of one or two years as the lessee, his executors, administrators, or assigns, may desire, at the same yearly rent and under and subject to the same covenants, provisos and agreements as are herein contained other than this present covenant."

The document was produced for registration impressed with a stamp of the value of Rs. 12-8-0 and was impounded as being insufficiently stamped, and forwarded to the Collector of Madras, who held that it was chargeable with an additional stamp duty of Rs. 12-8-0 as an agreement to lease under article 35 of schedule I of the Stamp Act, 1899, in respect of the covenant for renewal, and levied the deficient stamp duty, together with a penalty of Rs. 5. The Board of Revenue was appealed to and upheld the Collector's order, but, at the request of the solicitors to the lessee, referred the case to the High Court.

The Government Pleader, (Mr. E. B. Powell), for the referring officer, submitted that the document was chargeable with the

additional duty. He referred to, *Hand v. Hall*(1) and *Reference under Stamp Act, s 57*(2), and contended that the point now raised had not been expressly decided in the latter case

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s. 57.

Mr. D. Chamier, for the lessee, was not called upon.

JUDGMENT —The question referred for opinion is, whether an instrument of lease, for a term of three years at a monthly rent of Rs. 190, with a covenant on the part of the lessor to renew the lease at the option of the lessee for a further term of one or two years from the expiration of the said term of three years, is rightly stamped, only with the duty payable on a lease for a term of three years, or whether it should be stamped with the aggregate of the duties payable on a lease for a term of three years and on an agreement to give a lease for a term of two years.

We are clearly of opinion that the instrument has been rightly stamped as a lease for a term of three years and that the Collector was in error in levying an additional stamp calculated upon an agreement to give a lease for a term of two years at the monthly rent of Rs. 190.

Under article 35 of schedule I to the Stamp Act "lease" includes "an agreement to let" and an "agreement to let" has to be stamped with the same duty as a lease. Under section 5 of the Stamp Act, an instrument comprising or relating to several distinct matters is chargeable with the aggregate amount of the duties with which separate instruments each comprising or relating to one of such matters would be chargeable under the Act; and it is apparently under this section that the Collector has levied the additional stamp duty. It is clear that this section is inapplicable to the transaction and that the instrument in question relates only to one matter and not to two distinct matters. The lessee agrees, among other things, to pay a monthly rent of Rs 190, for the premises in question for a period of three years in consideration of the lessor demising the premises for a period of three years and also agreeing to renew the lease, at the option of the lessee, for a further term of one or two years. If the covenant to renew were disannexed from the lease, there would be no consideration for the covenant to renew (per Maule, J.,—*Worthington v. Warrington* (3)). A covenant for renewal at the option of the

(1) L.R., 2 Ex. D., 355.

(2) I.L.R., 24 Mad., 176.

(3) 17 L.J., (C.P.), 117 at p. 119.

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s. 57.

lessee is an ordinary covenant in a great many leases and for at least two centuries, it has been held to be a covenant running with the land (per Farwell, J., in *Muller v. Trafford*(1)). A mere agreement to lease is not a covenant which will run with the land and will not bind a transferee for valuable consideration without notice of the agreement. The transaction or matter to which the instrument in question relates is single and indivisible and cannot be treated as relating to two distinct matters within the meaning of section 5 of the Stamp Act. The instrument contains only one contract, a demise; the option of renewal of the lease is ancillary to it and forms part of the consideration for entering into the lease.

Worthington v. Warrington(2) is a clear authority for holding that the instrument in question is rightly stamped as a lease for a term of three years only. In that case, the lease was for a term of two years, at a rent of £50 a year, and the lessee also had the right of purchasing the premises at the determination of the lease or at any time during the term of the lease. It was held that a thirty-shilling stamp was sufficient and the contention that it required an additional thirty-shilling stamp for the agreement to sell the premises to the lessee at his option, was over-ruled. Creswell, J., in over-ruling the contention observed as follows in the course of the argument:—"This is not more than a covenant "to renew, which is usual in leases and which does not, on that "account, require two stamps. The lease and the agreement to purchase are the consideration for the rent. If the lease were forfeited, the right of purchase would be forfeited also." *Phillips v. Phillips*(3) supports the same view. In that case it was held that the agreement for a new lease which was contained in an instrument of surrender of a lease for lives was part of the contract and that the reference to it in the deed of surrender was not a "matter or thing," not "incident to the sale and conveyance," but was necessarily connected with it. In *Referred Case No. 1 of 1876*(4) on a reference by the Board of Revenue, it was held that a conveyance with the usual covenant for title, cannot be construed as constituting an indemnity bond, so as to render the document liable to stamp duty as an indemnity bond in addition to the stamp

(1) [1901] 1 Ch., 54 at p. 60.

(2) 17 L.J., (C.P.), 117 at p. 119.

(3) 11 Ad. & E., 796.

(4) I.L.R., 1 Mad., 133.

duty to which it is liable as a conveyance. It was there held that an instrument can be regarded as falling under two distinct categories, each requiring a separate stamp, only where there is what is called a "distinct consideration" for each and not where there is a unity of consideration as in the present case.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

ACHUTARAMARAJU AND ANOTHER (PLAINTIFF'S
REPRESENTATIVES), APPELLANTS,

1901.
August 8, 12

v.

SUBBARAJU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Evidence Act—Act I of 1872, s 92—Evidence to vary written instrument—Execution of sale-deed—Subsequent redemption suit on footing that the sale was in fact a mortgage—Evidence of subsequent conduct to show collateral agreement—Inadmissibility.

On 23rd September 1876, defendant wrote to plaintiff, inviting plaintiff to execute a sale-deed of certain land in favour of defendant and promising that if plaintiff did so, defendant would discharge plaintiff's debts out of the income to be derived from the land, and would, after the debts had been discharged, or before, if so requested, restore the land to plaintiff, upon payment by plaintiff of a sum of money that had been advanced to him by defendant. This document was not registered. On 29th September 1876 plaintiff executed a deed of sale of the land in defendant's favour, which was unconditional in its terms, and which was duly registered. Plaintiff subsequently brought a redemption suit against defendant on the deed of 29th September, and he contended that though that deed was, in its terms, an absolute conveyance, he was entitled to adduce evidence of the subsequent conduct of himself and defendant, to show that the transaction was, in fact, not a sale but a mortgage:

Held, that the evidence was not admissible.

Balkishen Das v. Legge, (L.R., 27 I.A., 58; I.L.R., 22 All., 149), followed. *Khankar Abdur Rahman v. Ali Hafez*, (I.L.R., 28 Calc., 256), and *Mahomed Ali Hossein v. Nazar Ali*, (I.L.R., 28 Calc., 289), dissented from.

Plaintiff further contended that the contract was not contained in the deed of sale alone, but must be gathered from both of the documents referred to above:

* Appeal No. 13 of 1900 against the decree of C. G. Kuppusami Ayyar, Subordinate Judge of Cocanada, in Original Suit No. 38 of 1898.

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Held, that the document of 23rd September being unregistered was inadmissible in evidence as it purported to create or limit an interest in the immovable property conveyed under the deed of sale

Pranal Annce v Lakshmi Annce, (I. R., 26 I A, 101, I L R., 22 Mad., 508), followed

SUIT for redemption. The plaint was as follows — "The first defendant's father was the son-in-law of the plaintiff. The plaintiff borrowed a sum of Rs. 1,500 from the first defendant's father and executed a mortgage-deed at first on the 16th September 1876. Subsequently, within a few days, seeing that the plaintiff had some other debts to clear and that it would be difficult for him to manage the whole estate himself and discharge the said debts, the first defendant's father entered into an agreement, in the presence of arbitrators, that, should a nominal sale-deed be executed in his favour for the loan amount of Rs 1,500, he would himself manage the property, discharge the debt due to himself as well as that due to others, by means of the income derivable therefrom, and restore the property to the plaintiff; and gave a letter also to that effect. The plaintiff believed the same and executed a sale-deed nominally in his favour on the 29th September 1876, in respect of 165 acres 26 cents of land detailed in the schedule marked A, and filed herewith, with the view that the mortgage would not be effectual as such. Ever since the date of the said deed, the defendant's father himself has been enjoying all the lands remaining in schedule A after excluding the lands of schedule B. The plaintiff has retained the lands of schedule B in his own possession, and is carrying on cultivation himself in some of them, and he has disposed of some of them otherwise. When the plaintiff called upon the defendant's father to render account to him and to deliver back the whole of the lands and the mesne profits due to him, stating that his debt would have been discharged a long time ago, the defendant's father stated finally on the 12th August 1897, that the profits of the lands until five years prior thereto had been spent in discharging the debts, &c, and entered into an agreement in the presence of respectable men, that he would render account for the receipts and disbursement relating to the profits of the last five years within a week and deliver back the lands and the profits due to him, and executed a written document, also, in favour of the plaintiff to evidence the same. But, the first defendant's father having died

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a short time after his entering into the agreement in the said manner, the plaintiff called upon the first defendant to deliver possession of the lands, &c., but without doing so, the first defendant opposed even the plaintiff's right itself. The whole debt due to the first defendant's father having been discharged, much profit is due to the plaintiff from the first defendant. The first defendant should be made to account and the said amount be determined. The said amount is estimated and fixed at Rs. 3,600."

Plaintiff claimed an account, and delivery to him of the mortgaged property on payment by him of whatever might be found to be due. Defendants Nos 2 to 12 were impleaded as raiyats cultivating the lands.

First defendant denied the mortgage, and said that plaintiff had sold the land to his father and had been paid the price; he said the sale was not a nominal one, and denied that an account had been promised to plaintiff. He contended that plaintiff was not entitled to the land or to an account, or to maintain the suit.

The first issue was — "Whether the property in question was mortgaged or sold to first defendant's father." The deed of sale executed by plaintiff in favour of first defendant's father, bearing date 29th September 1876, was filed as exhibit L. It began with the words "Deed of sale executed, &c.," and continued "Particulars of land sold to you out of the jirayati which is my self-acquisition, which is in my possession and enjoyment and which is situate in," &c. After setting out the survey numbers it concluded as follows — "Land . . . measuring one hundred and sixty-five acres and twenty-six cents has been this day sold to you for Rs. 1,500 and the purchase money has been just now received from you in cash. So you shall enjoy the said lands from the next Iswara year (1877 to 1878) forward according to your pleasure, yourself paying the sirkar taxes payable on the said lands, having the powers of gift and sale and enjoying happily. If any disputes whatever from gnatis and neighbours concerning this should arise, I shall remove the same and see that the sale holds good to you without any obstacle. To this effect is this sale-deed of jirayati land executed with my consent."

Exhibit M was a document purporting to be signed by first defendant's father and addressed to plaintiff, bearing date 23rd September 1876, in which it was stated:—"Afterwards: you have

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executed a registered cowle in my favour on the 14th instant for the lands belonging to you for Rs. 1,500. From that itself, the said document is no bar should your creditors mean to put up these lands to auction. Moreover if you should take up this affair upon yourself, it will make you unable to discharge the debts and tend also to their enhancement. Under the present circumstances, seeing that I am your heir (close relative), if you should execute a sale-deed in my favour for that very amount, I shall discharge your debts by means of a portion of the profits that are realized from those lands and deliver to you those documents; and I shall also give to yourself the remaining profit. I shall restore your lands and your documents to you, immediately on your paying me my principal and interest, either when your debts are completely discharged or when you demand the same. Till then, you should regard this letter itself as a document for the same."

Exhibit M had not been registered, and the Subordinate Judge found that it was a forgery. He held on the evidence that the property had been sold to first defendant's father, and dismissed the suit.

Plaintiff's legal representatives preferred this appeal.

Seshaguri Ayyar and Sundaranana Rao for appellants.— Though exhibit L purports to be a deed of absolute sale, plaintiff contends that the transaction was, in fact, one of mortgage, and it is submitted that evidence is admissible to show it, under section 92 of the Evidence Act, proviso 1, on the ground that the execution of exhibit L was procured by a fraudulent representation: and that no consideration passed. That being so, the earlier document exhibit M is the operative document which binds the parties. If exhibit M is not regarded as a genuine document, our contention is that the subsequent conduct of the parties may be proved and considered as being evidence of an oral agreement collateral to the written instrument; that is, that the written instrument does not contain the entire terms of the contract. The decision of the Judicial Committee in *Balkishen Das v. Legge*(1) has been explained in *Khankar Abdur Rahman v. Ali Hafez*(2). That decision must not be construed as a mere paraphrase of paragraph 6 of section

(1) L.R., 27 I.A., 58; I.L.R., 22 All., 149.

(2) I.L.R., 28 Cal., 256.

92 of the Evidence Act. It means more. It means that evidence may be given of circumstances connected with the document, even though those circumstances may have come into existence afterwards. [BHASHYAM AYYANGAR, J.—The Judicial Committee has laid down that decisions of the Court of Chancery which are due to the strong leaning of Courts of Equity in favour of the right of redemption should not be applied to cases governed by the Indian Evidence Act, section 92, of which is one of general application—applicable just as much to mortgages as to promissory notes.] The words “surrounding circumstances” have a wider meaning than the words “existing facts.” So, evidence may be given of subsequent conduct to prove the existence of a collateral oral agreement. The Full Bench ruling in *Preonath Shaha v. Madhu Sudan Bhuiya*(1) was passed before the Privy Council case. In *Kader Morden v. Nepean*(2), also a Privy Council decision, evidence was gone into to show that what purported to be a sale was in reality a mortgage and could be redeemed. [BHASHYAM AYYANGAR, J.—There may have been some ambiguity; and there was no formal document such as a sale-deed in that case.] The petition, printed at page 893, is unambiguous; it was construed as a deed of sale, and evidence of the conduct of the parties was admitted. As a result of the decisions in *Balkishen Das v. Legge*(3); *Khanakar Abdur Rahman v. Ali Hafes*(4); *Mahomed Ali Hossain v. Nazar Ali*(5); *Preonath Shaha v. Madhu Sudan Bhuiya*(1); *Rakken v. Alagappudayan*(6); it is submitted that oral evidence is admissible to prove that a document which purports to be a sale-deed is in fact a mortgage, even though the document may be unambiguous. The Judicial Committee have held in *Sah Lal Chand v. Induraj*(7) that oral evidence may be adduced to contradict a recital in a document, to the effect that money forming the consideration for it has been paid. [BHASHYAM AYYANGAR, J.—A distinction is drawn between proving an alleged term of a contract and showing that an admission or recital of a fact is wrong. In that case the terms of the contract

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(1) I.L.R., 25 Calc., 603.

(2) L.R., 21 I.A., 96; I.L.R., 21 Calc., 882.

(3) L.R., 27 I.A., 58; I.L.R., 22 All., 149.

(4) I.L.R., 28 Calc., 256.

(5) I.L.R., 28 Calc., 289.

(6) I.L.R., 16 Mad., 80.

(7) L.R., 27 I.A., 93; I.L.R., 22 All., 370.

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are not contradicted; but merely the recital That is not a variation of the terms of the contract] Lord Dwyer states the two cases in which evidence of conduct is admissible, namely, to show the terms of a lost document, or of an ancient document. See *North Eastern Railway v Lord Hastings*(1) But under the Indian Law of Evidence that statement cannot be exhaustive. [BHASHYAM AYYANGAR, J—Assuming exhibit M to be genuine, and that it contains part of the contract, how is it admissible, it not being registered? Does it not limit or extinguish a right by converting the transaction referred to in exhibit L from a sale into a mortgage?] In *Patel Ranchod v. Bhikabhai*(2) a subsequent document was admitted [BHASHYAM AYYANGAR, J—The prior document was a mortgage and the operation of the mortgage was not affected by the subsequent document.]

V. Krishnasami Ayyar and *V. Ramesam*, for respondents, were not called upon: but mentioned *Mayandi Chetti v. Oliver*(3); and *Rahman v. Elahi Baksh*(4) to the Court.

JUDGMENT—The appellant brings this suit to redeem the plaintiff lands on the footing that they were really mortgaged to the first respondent's father, though there was what purported to be an absolute conveyance of the lands to the respondent under exhibit L, and it is contended that though exhibit L is, on the face of it, an absolute conveyance it was really agreed between the parties at the time of the transaction that the respondent's father should hold the lands conveyed as a usufructuary mortgagee, and that the profits of the land should be applied to the discharge of the mortgage money and other debts due by the plaintiff to strangers. The Subordinate Judge dismissed the suit on the ground that the evidence in the case established that the transaction was really a sale, not a mortgage as contended by the plaintiff.

Plaintiff appeals

Before going into the merits of the appeal we required the appellant to show how it was open to him, in the face of section 92 of the Indian Evidence Act, to adduce evidence to contradict the terms of the contract of sale, as clearly and unambiguously set forth in exhibit L. He relied principally on

(1) [1900] A.C., 260

(3) I.L.R., 22 Mad., 261.

(2) I.L.R., 21 Bom., 704.

(4) I.L.R., 28 Cal., 701.

the decisions in *Khankar Abdul Rahman v. Ali Hafez*(1) and *Mahomed Ali Hossein v. Nazar Ali*(2), contending that evidence of the conduct of the parties subsequent to the date of the sale was admissible to establish that an absolute conveyance was intended to operate only as a mortgage.

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With great respect for the learned Judges who took part in those decisions we are unable to concur either with the conclusion arrived at or with the reasoning on which it rests. Evidence of such conduct could be relevant only on the ground that the conduct leads to the inference that there was a contemporaneous oral agreement or statement between the parties that the absolute sale-deed was to operate only as a mortgage and not as a sale;—but section 92 of the Evidence Act enacts that no evidence of any oral agreement or statement shall be admitted as between the parties or their representatives for the purpose of contradicting, varying, adding to, or subtracting from, the terms of any contract, grant or disposition of property which has been reduced to writing, and no exception is made in any of the provisos to section 92, or elsewhere in the Act, in favour of evidence which consists of the acts and conduct of parties from which an inference might be drawn that there was such an oral agreement to vary the terms of the contract or grant. The question before us is really concluded by the recent decision of the Privy Council in *Balkishen Das v. Legge*(3):—“Their Lordships do not think that oral evidence “of intention was admissible for the purpose of construing the “deeds or ascertaining the intention of the parties. By section “92 of the Indian Evidence Act (Act I of 1872) no evidence of “any oral agreement or statement can be admitted as between “the parties to any such instrument or their representatives in “interest for the purpose of contradicting, varying, or adding to, “or subtracting from, its terms, subject to the exceptions contained “in the several provisos. It was conceded that this case could not “be brought within any of them. The cases in the English Court “of Chancery which were referred to by the learned Judges in “the High Court have not, in the opinion of their Lordships, any “application to the law of India as laid down in the Acts of the “Indian Legislature. The case must therefore be decided on a

(1) I.L.R., 28 Calc., 256.

(2) I.L.R., 28 Calc., 280.

(3) I.L.R., 27 I.A., 58; I.L.R., 22 All., 148.

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"consideration of the contents of the documents themselves with
"such extrinsic evidence of surrounding circumstances as may be
"required to show in what manner the language of the document
"is related to existing facts."

After this clear statement of the law by the highest judicial tribunal it is unnecessary for us to consider the decisions of the Court of Chancery and the decisions of this and of other High Courts in India based chiefly on the decisions of the Court of Chancery.

In this connection we may also draw attention to the distinction which is drawn by the same tribunal between the admissibility of evidence to show that a recital of a fact in a contract or grant is erroneous, and evidence to vary the terms of a contract or grant (*Sah Lal Chand v. Indarjit*(1)). and also to the decision in the House of Lords in *North Eastern Railway v. Lord Hastings*(2) in which it was held that when the words of a deed were plain and unambiguous, the fact that the parties understood it otherwise and acted on such understanding for a period of more than forty years, could not affect the construction of the instrument, and the effect to be given to it.

It was also contended for the appellant that the terms of the grant were not contained in exhibit L alone, but partly in that document and partly in exhibit M, of a different date, and that the two must be read together as the written record of the transaction. The Court below found exhibit M to be a forgery, but assuming it to be genuine, and assuming also that the transaction was partly recorded in exhibit M, we are clearly of opinion that exhibit M is inadmissible in evidence and cannot affect the property because it has not been registered, though its registration is compulsory inasmuch as, on the face of it, it purports to create or limit an interest in the immovable property conveyed under exhibit L (*vide Pranal Annee v. Lakshmi Annee*(3)).

In the result we dismiss the appeal with the costs of the first respondent.

(1) L.R., 27 I.A., 93; I.L.R., 22 All., 370.

(2) [1900] A.C., 260.

(3) L.R., 26 I.A., 101 at p. 106; I.L.R., 22 Mad., 508.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Moore.

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MADRAS (COMPLAINANTS), PETITIONERS,

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8, 16.

v.

MAJOR BELL (DEFENDANT), COUNTER-PETITIONER.*

Criminal Procedure Code—Act V of 1898, s. 197—Necessity for sanction to prosecute public servant—Cases in which the fact that accused is a public servant is a necessary element in the offence—City of Madras Municipal Act (Madras)—Act I of 1884, s. 341.

Under section 311 of the City of Madras Municipal Act, any person bringing or causing to be brought timber within the City of Madras without a license, obtained on payment of a fee, is liable to a fine. The Superintendent of the Gun Carriage Factory in Madras, who is an officer holding a commission in the Royal Artillery, brought or caused to be brought timber within the aforesaid limits without license. On a complaint being lodged against him under the section, it was contended that he was a public servant within the meaning of section 197 of the Code of Criminal Procedure and that the Court could not take cognizance of the offence inasmuch as the sanction referred to in section 197 had not been obtained :

Held, that sanction was not necessary, as the offence charged was not one which could be committed only by a public servant, nor did it involve as one of its elements that it had been committed by a public servant.

Nandu Lal Boral v. Mitter, (I.L.R., 26 Calc., 852), followed.

COMPLAINT preferred by the Municipal Commissioners for the City of Madras against Major C. T. Bell, R.A., under section 311 † of the City of Madras Municipal Act, for having brought timber into the City of Madras without payment of import

* Criminal Revision Case No 74 of 1901, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of J. Meredith, Chief Presidency Magistrate, Egmore, Madras, on Application No. 1139 A of 1901, dated 9th February 1901.

† Section 341 of the City of Madras Municipal Act (I of 1884) enacts as follows :—"No timber or firewood shall be brought within the City, without a license specifying the place and conditions of storing, to be issued by the President under the bye-laws, on payment of a fee which shall not exceed the following rates : timber, Rs. 5 per ton; firewood, 6 annas per ton. Whoever without such license, or after such license has been suspended or cancelled, brings or causes to be brought within the City any timber or firewood, shall be liable to a fine not exceeding one hundred rupees. When any timber or firewood, in respect of which a license fee has been paid under this section, is exported beyond the limits of the City, nine-tenths of the fee levied thereon shall be refunded."

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license fees due thereon. Sanction for the prosecution had not been obtained, and it was contended that it was not necessary. A previous complaint had been preferred of a similar nature, against the same defendant, who had, however, been then charged as Superintendent of the Gun Carriage Factory. The present complaint set out the name and private address of the defendant, and made no mention of his official position as Superintendent of the Gun Carriage Factory. The previous summons had been dismissed.

The Chief Presidency Magistrate made the following Order:—
“This is an application by the municipality charging Major Bell, Superintendent of the Gun Carriage Factory, with having, on various specified dates, brought into Madras City, certain quantities of timber without obtaining a license on payment of the fees due thereon, and without payment of the licensing fees, as required by section 341 of the City of Madras Municipal Act I of 1884, thereby committing an offence punishable under the section quoted.

“The application is substantially the same as that made before me in November last. It has been amended by inserting the name of Major Bell as the accused in place of the Superintendent, Gun Carriage Factory. I am therefore in effect asked to revise my own order. This I cannot do. Viewing that decision, for which no reasons were assigned in the light of the arguments now put forward, I make the following remarks:—

“In presenting the present application, counsel for the municipality referred to section 1 (2) of the Criminal Procedure Code and urged that in the absence of a special proviso, section 197 of the Code could not be applied to the detriment of his client. The latter section requires a mere formality to be observed before cognizance can be taken of the offence; this cannot, I think, be said to “affect,” in the sense in which the word is used in section 1 (2), the Local Act in question.

“It was also argued that sanction under section 197 was unnecessary. The learned counsel quoted *Nando Lal Basak v. Mitter* (1), wherein it was held that the sanction required related only to those acts or omissions by a Judge or public servant, which are declared, by any Act or Statute relating to India, to be

(1) I.L.R., 26 Cal., 852.

offences, when they are committed by a Judge or public servant in their capacities as such.

"Had Major Bell of his own initiative caused any steps to be taken, which would render him liable to pains and penalties under the Municipal Act, the ruling relied on might possibly apply.

"In this instance the act committed was not a personal one, Major Bell was directed by Government, as he informed the Court, to do that for which the municipality now seek to prosecute him for doing.

"The Secretary of State is responsible for the acts of public servants done within the scope of their authority. If proceedings can be instituted against Major Bell, which I doubt, the offence herein alleged against him appears to me essentially one requiring the sanction of Government under section 197 of the Code before cognizance can be taken of it. The application is refused."

Against that order the Municipal Commissioners preferred this criminal revision petition under sections 435 and 439 of the Code of Criminal Procedure and article 15 of the High Court Charter Act, 1861, and article 28 of the Letters Patent.

Mr. K. Brown, for the petitioners.—Sanction is unnecessary and the trial should be proceeded with. *Nando Lal Basak v. Mitter*(1) shows that no sanction is necessary under section 197 of the Code of Criminal Procedure, unless the public servant commits an offence in his official capacity. The principle of the cases is that sanction is only necessary where the act complained of can have no special signification except as an act done by a public servant. The fact that the accused is a public servant must be a necessary element in the offence. The case of *Reg v. Parshram Keshav*(2), referred to in the Calcutta case, was decided on the Code of 1861, which contained a provision in section 167* practically the same as the section of the present Code.

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(1) I L R, 28 Calc, 852

(2) 7 Bom H C R, (Cr), 81.

* Section 167 of Act XXV of 1861 (Criminal Procedure Code) enacted as follows:—"A charge of an offence punishable under the Indian Penal Code, of which any Judge or any public servant not removable from his office without the sanction of the Government, is accused as such Judge or public servant, shall not be entertained against such Judge or public servant except with the sanction or under the direction of the Local Government, or of some officer empowered by the Local Government, or of some Court or other authority to which such Judge or public servant is subordinate, and whose power so to sanction or direct such prosecution the Local Government shall not think fit to limit or reserve."

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[DAVIES, J.—At the date of that decision, the word "offence" was defined as applying only to offences under the Indian Penal Code, but now the definition includes an offence under any law] The enlargement of the definition does not lessen the authority of *Reg v. Parshram Keshav*(1), because the Code of Criminal Procedure then in force covered all offences in the Indian Penal Code, under which the charge was laid. [MOORE, J., enquired whether it must be taken that whatever the defendant had done, had been done by him in his capacity of Superintendent to the Gun Carriage Factory] The timber was consigned to the Gun Carriage Factory. The decision in *Reg v. Parshram Keshav*(1) was approved by West and Pinhey, JJ, in *Imperialis v. Lakshman Sakharam*(2) and the Bombay cases have been approved by Prinsep and Hill, JJ., in *Nando Lal Basak v. Mitter*(3) The judgment of Parker, J., sitting as a single Judge, in *In re Gulam Muhammad Sharif-ul-Daulah*(4) is really not applicable, as it was decided on section 197* of the Code of 1882. The earliest section relating to sanction is section 167 of the Code of 1861, (Act XXV of 1861), and is practically similar in effect to section 197 of Act V of 1898; and *Reg v. Parshram Keshav*(1) was decided on section 167 of Act of 1861. Section 466† of the Code of 1872, (Act X of

(1) 7 Bom HCR, (Cr), 61

(3) 1 LR, 26 Cal, 852.

(2) 1 LR, 2 Bom, 481 at p 485.

(4) 1 LR, 9 Mad, 439

* Section 197 of Act X of 1882 (Criminal Procedure Code) enacts as follows —"When any Judge, or any public servant not removable from his office without the sanction of the Government of India or the Local Government, is accused as such Judge or public servant of any offence, no Court shall take cognizance of such offence, except with the previous sanction of the Government having power to order his removal, or of some officer empowered in this behalf by such Government, or of some Court or other authority to which such Judge or public servant is subordinate, and whose power to give such sanction has not been limited by such Government. Such Government may determine the person by whom, and the manner in which, the prosecution of such Judge or public servant is to be conducted, and may specify the Court before which the trial is to be held"

† Section 466 of Act X of 1872 (Criminal Procedure Code) enacts as follows:—"A complaint of an offence committed by a public servant in his capacity as such public servant, of which any Judge or any public servant not removable from his office without the sanction of the Government is accused as such Judge or public servant, shall not be entertained against such Judge or public servant, except with the sanction or under the direction of the Local Government, or of some officer empowered by the Local Government, or of some Court or other authority to which such Judge or public servant is subordinate, and whose power as to sanction or direct such prosecution the Local Government shall not think

1872), contains the words "in his capacity as such public servant," which are not unlike those used by Parker, J, in *In re Gulam Muhammad Sharif-ud-Daulah*(1), namely, "in his official capacity." The word "capacity" is now omitted, and the only question is whether the defendant is charged "as such public servant" The reasoning in *In re Gulam Muhammad Sharif-ud-Daulah*(1) might be good as based on the former Code, but cannot govern a case to be decided under the present Code. The sixth form of indictment in Mayne's 'Criminal Law' supports my contention It contains the phrase "being a police peon and as such a public servant." No doubt sanction would be necessary for a charge brought in that form. Here the defendant is not charged as a public servant, and section 197 has no application at this stage of the case. Section 197 might easily have included the words used in the Police Act of 1861, section 43, *i.e.*, "in such capacity:" or those used in Act XVIII of 1850, *i.e.*, "in his judicial capacity" Those Acts were both enacted at about the time when the section relating to sanction was first introduced into the Criminal Procedure Code. It is submitted, therefore, that if the defendant is not charged as a public servant the Magistrate is bound to take cognizance of the offence, and it is immaterial if it is disclosed that he is a public servant. The offence under section 341 of the City of Madras Municipal Act may be committed by any one, whether public servant or not, whereas an offence in chapter IX of the Code of Criminal Procedure can only be committed by a public servant who is really acting in that capacity. Here it may be the duty of the defendant to remove timber, but the offence consists,—not in removing it, but in removing it without obtaining the necessary license. It is also submitted that section 197 has no application to a prosecution under the Madras Municipal Act, this being a "special or local law," within the meaning of section 1 of the Code of Criminal Procedure, and only some of the provisions of the Code of Criminal

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fit to limit or reserve No such Judge or public servant shall be prosecuted for any act purporting to be done by him in the discharge of his duty, unless with the sanction of Government. The sanction must be given before the commencement of the proceedings The Local Government may limit the person by whom, and the manner in which, the prosecution is to be conducted, and may specify the Court before which the trial is to be held."

(1) I.L.R., 9 Mad., 439.

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Procedure are made applicable by the City of Madras Municipal Act.

The Advocate-General (Hon. Mr. *J. P. Wallis*), for the defendant.—Section 5 (2) of the Code of Criminal Procedure applies the whole Code to “all offences under any other law,” and provides that such offences shall be “investigated . . . and otherwise dealt with,” and so section 197 is applicable to this case and sanction is necessary. This is an “offence” within the meaning of section 4 (o) of the Code of Criminal Procedure and there is nothing in section 197 to show that its operation should be limited, while the definition of an “offence” in section 4 (o), as including “any act or omission made punishable by any law for the time being in force,” must be taken to include “any offence,” and there is no authority for dividing offences into categories, and holding that the Code applies to some and not to others. There is no real conflict between section 4 and section 5 of the Code of Criminal Procedure. The Code relates entirely to procedure, and the proviso in the second paragraph of section 1 must be construed as relating only to any special or local law relating to procedure, if there is one, and if there is not, the Code of Criminal Procedure is applicable. The City of Madras Municipal Act contains no provisions relating to procedure, and so the procedure to be followed in charges under it must be taken from the Code of Criminal Procedure. Where there is an absence of authority the sections of the Code must be construed on their plain wording. Section 197 uses the phrase “any offence” and should be read with section 4 (o).

Mr. *K. Brown*, in reply.

The Court delivered the following judgments:—

MOORE, J.—The Municipal Commissioners for the City of Madras made a complaint before the Chief Presidency Magistrate against Major Bell, the Superintendent of the Gun Carriage Factory, alleging that he had, on certain occasions, specified in the written complaint, brought or caused to be brought from the Salt Cotaurs Station of the Madras Railway Company within the City of Madras certain logs of wood which had been consigned to him as Superintendent without obtaining a license on payment of the fees due thereon, and had thereby committed an offence punishable under section 341 of the City of Madras Municipal Act. The Chief Presidency Magistrate rejected the complaint on the ground

that before cognizance could be taken of the offence with which Major Bell was charged, the sanction of Government should be obtained under section 197 of the Criminal Procedure Code. This is an application put in on behalf of the Municipal Commissioners praying the High Court to revise the proceedings of the Chief Presidency Magistrate, and direct him to proceed with an enquiry into the complaint preferred to him.

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The question for consideration is whether Major Bell, the Superintendent of the Gun Carriage Factory, is accused of having committed the offence laid to his charge as such Superintendent. A number of decisions of the various High Courts have been referred to at the hearing of this matter, but owing to the manner in which the section of the Criminal Procedure Code now under consideration has been altered from time to time from 1861 to 1898, these decisions do not go far to help us in interpreting the section as it now stands. For example, section 167 of the first Criminal Procedure Code (Act XXV of 1861) related to charges of offences punishable under the Indian Penal Code only and the Circular of the Calcutta High Court issued in 1864 and the decision of the Bombay High Court in *Reg v. Parshram Keshav*(1), must be read in the light of that fact. If section 197 of the present Criminal Procedure Code referred to cases under the Penal Code only there can be no question that it must be decided that no sanction is necessary for Major Bell's prosecution. In section 4 (o), however, of the Criminal Procedure Code now in force "offence" is defined as meaning "any act or omission made punishable by any law for the time being in force."

Further, section 466 of the Criminal Procedure Code of 1872 (Act No. X) which corresponds with section 167 of the Act of 1861, provides that no complaint of an offence committed by a public servant in his capacity as such servant should be entertained without sanction, and there is also in this section the following most important paragraph, "No such Judge or public servant shall be prosecuted for any act purporting to be done by him in the discharge of his duty unless with the sanction of Government." If this paragraph were to be found in the present Criminal Procedure Code I can entertain no doubt that we should be obliged to hold that Major Bell could not be proceeded against

[1] 7 Bom. H.C.B., (Cr.), 61.

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without sanction. The unreported case of *Sreemanto Chatterjee* decided in 1881 and alluded to (*vide* page 860) in the judgment in *Nando Lal Basak v. Mitter*(1) was decided under this section and it was there held by Mr. Justice Pontifax that, by virtue of the paragraph now under consideration, sanction was necessary in the case of the public servant whom it was then proposed to prosecute. Mr Justice Field, however, expressed the opinion that the first paragraph of section 466 was intended to apply to those cases in which the offence charged is an offence which can be committed by a public servant only, cases, that is, in which being a public servant is a necessary element in the offence. This expression of opinion is of importance in view of the fact that the first paragraph of section 197 of the Criminal Procedure Code of 1898 differs but little from the first paragraph of section 466 of the Act of 1872, and that the second paragraph of this latter section has not been reproduced in either the Criminal Procedure Code of 1882 or that of 1898.

There is one slight alteration in the first paragraph of section 197, as found in the Acts of 1882 and 1898, as compared with the corresponding section (466) in the Act of 1872, to which considerable importance has been attached at the hearing of this petition. This is as follows:—In the older Act the section opens, “A complaint of an offence committed by a public servant in his capacity as such public servant, &c” While in the two later Acts the “words in his capacity as such public servant” have been omitted. It does not appear to me that much importance can be attached to this alteration. I cannot see any real distinction between an offence committed by a public servant in his capacity as such public servant, of which a public servant is accused as such public servant (section 466 of Act X of 1872) and “an offence of which a public servant is accused as such public servant” (*vide* section 197 of the Criminal Procedure Code of 1898). The wording of the revised paragraph has been made simpler and less involved than it was previously, but the meaning, I think, remains the same.

On the other hand, great importance must, in my opinion, be attached to the exclusion from the Acts of 1882 and 1898 of the paragraph in the Act of 1872 providing that no public servant can

(1) I.L.R., 26 Calc., 852 at p. 860.

be prosecuted for any act purporting to be done by him in the discharge of his duty unless with the sanction of Government. I agree with Mr. Justice Field in the interpretation that I have already quoted put by him on the section as it stands after the omission of this paragraph, an interpretation which has been followed by the Calcutta High Court in a recent case where the learned Judges, after reviewing all the decisions hold that "the language of the section—'is accused as such Judge'—must involve, as one of its elements, that it was committed by a person filling that character." Accepting as correct the interpretation put in these two decisions on this section by the Calcutta High Court it follows that the sanction of Government was not necessary in the present case. It cannot be held that the offence of bringing wood into the City of Madras without a license is one which could be committed by a public servant only or that such an offence involves as one of its elements that it was committed by (*e.g.*) the Superintendent of the Gun Carriage Factory. It would, in my opinion, be unreasonable to assume that the most important paragraph to which I have already alluded, protecting public servants not removeable from office except by Government from prosecution without sanction for all acts done by them in the discharge of their duty, was not dropped out of the Code of Criminal Procedure deliberately and for some cogent reason. Such reason was, I think it may be fairly presumed, a consideration of the grave inconveniences which would result if it were to be held that all public servants who are not removeable from office without the sanction of the Government of India or the Local Government were to be exempted from criminal liability for all acts amounting to offences done by them while acting in their official capacity unless sanction could be obtained for their prosecution under section 197 of the Criminal Procedure Code (*vule Nando Lal Basak v. Mitter*(1)).

I am, for the foregoing reasons, of opinion that in the present case sanction was not necessary and that the Chief Presidency Magistrate should therefore be directed to take the complaint against Major Bell on his file and dispose of it according to law.

DAVIES, J.—I concur.

Mr. Douglas Grant—Attorney for the petitioners.

Mr. E. Barclay—Attorney for the counter-petitioner.

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(1) I.L.R., 26 Calo, 852 at p. 862.

APPELLATE CIVIL

*Before Mr. Justice Davies and Mr. Justice Moore.*1901
August 16.

REFERENCE UNDER COURT FEES ACT, 1870,

SECTION 5 *

Court Fees Act—Act VII of 1870, ss 4, 16—Stamp duty on memorandum of objections—When payable

Stamp duty on a memorandum of objections filed by a respondent in an appeal, under section 561 of the Code of Civil Procedure, need not, under section 16 of the Court Fees Act, be paid till the time of hearing

REFERENCE under section 5 of the Court Fees Act (VII of 1870). The question was whether, by reason of sections 16, 25 and 30 and the schedules of the Court Fees Act, a respondent who wishes to take objection to a decree at the hearing of an appeal, and files a memorandum of objection, as provided by section 561 of the Code of Civil Procedure, is liable to pay stamp duty on the memorandum at the time when it is filed, or only when the appeal comes on for hearing.

Sundara Ayyar for respondent in the second appeal —The only question is whether a memorandum of objections should be stamped at the time of its being filed or whether the party who wishes to raise the objections may pay the duty at the time of the hearing. Section 16 of the Court Fees Act (VII of 1870) is the only section in the Act relating to a memorandum of objections. It provides as follows :—[He read the section.] It is submitted that the words "The Court shall not hear such objection" imply that the fee may be paid at any time before the objection is actually heard, and not when the memorandum of objections is filed. The case of *Rashmonee Dossee v. Choudry Junmyoy Mu'ich* (1) which was a decision under note (e), article 11 of schedule B of Act XXVI of 1867 (corresponding to section 6 of Act VII of 1870) is an authority for this proposition. There, it was held that a petition of objections filed by respondent under section 348 of Act VIII of 1859 (corresponding to section 561 of Act XIV of 1882) would be received without being stamped, but would not be heard till the

* Stamp Reference No 5303 of 1901 (in connection with the memorandum of objections in Second Appeal No 585 of 1901), under section 5 of the Court Fees Act, 1870, by the Registrar of the High Court, Madras.
(1) 9 W.R., (O.R.), 356.

stamp duty was paid. The sections of the Court Fees Act which forbid the filing or exhibition or the reception or furnishing of an unstamped document are sections 4 and 6, the former of which applies to the High Courts in their extraordinary jurisdiction, and the latter to the mufassal Courts or to public offices. These sections apply to the documents specified in schedules I and II of the Act. But a memorandum of objections is not specified in schedule I or schedule II, and it would appear, therefore, to be unnecessary to stamp the memorandum at the time when it is filed. The valuation of the memorandum of objections is not to be made by the application of the rules of calculation set forth in article 1 of schedule I. The principle of valuation is given in section 16 of the Court Fees Act. The stamp-duty for the memorandum of objections is not calculated on its valuation according to article 1, but is the difference between what the stamp-duty on the memorandum of appeal would be, if the memorandum had comprised the portion of the decision objected to and the stamp-duty that has been paid on the memorandum of appeal. Section 561 of the Civil Procedure Code does not provide that section 541 applies to a memorandum of objections for all purposes, but specifically limits the applicability of section 541 by providing "so far as they relate to form and contents of the memorandum of appeal." The question of the memorandum of objections being stamped at the time of filing is not one relating to the form and contents of the memorandum of appeal, provided for by section 541 of the Code, but is dealt with in the Court Fees Act. Section 28 of the Court Fees Act provides that no document which ought to bear a stamp under that Act shall be of any validity unless and until it is properly stamped. But a memorandum of objections does not require a stamp under section 16. Section 30, which refers to cancellation of stamps applies only to documents which require to be stamped. [Reference was also made to *Girijanund Datta Jha v. Sailayanund Datta Jha*(1); *Fagan v. Chunder Kant Banerjee*(2); *Luleet Singh v. Muza Ali Reza*(3); *Sharoda Soonduree Debee v. Gobind Monee*(4); and *Babaji Hari v. Rajaram Ballal*(5)] The practice in Bombay seems to be that the stamp-duty in respect of a memorandum of objections is payable at

REFERENCE
UNDER
COURT FEES
ACT, s. 5.

(1) I.L.R., 23 Calc., 645 at pp. 650, 659

(2) 7 W.R., (C.R.), 452.

(3) 8 W.R., (C.R.), 322

(4) 24 W.R., (C.R.), 172.

(5) I.L.R., 1 Bom., 75 at p. 70.

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the time of hearing—*vide Fatma Begum v. Mir Zulfikaralikhhan*(1), referred to in page 8 of Desai's Court Fees Act, "The objection will not be heard until the fee in respect of them is paid, and the plaintiff must be ready to pay it at the hearing of the appeal" The decision in *Narayana v Krishna*(2) seems to show that the stamp-duty can be paid at the hearing.

T V. Vaidyanatha Ayyar, for the appellant in the second appeal.

JUDGMENT — We are clearly of opinion that, under section 16 of the Court Fees Act, the stamp-duty on objections made under section 561 of the Code of Civil Procedure need not be paid till the time of hearing. These objections, as section 561 of the Code of Civil Procedure now stands, have to be made by means of a document which has to be filed within one month after service of notice of the appeal, that is, on a date which is generally long prior to the date of hearing. The question that arises is whether that document is chargeable with Court fees at the time it is filed. It is clear that, under section 4 of the Court Fees Act, it is not so chargeable unless it is a document of any of the kinds specified in the first or second schedule annexed to the Act. A memorandum of objections is not a document so specified in those schedules. Such being the case we must hold that no fee is leviable on a memorandum of objections until the time of hearing, and it is then leviable under the special provision in section 16 of the Court Fees Act.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

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7, 20.

AHINSA BIBI AND OTHERS (PLAINTIFFS Nos. 1 to 3), APPELLANTS,

v.

ABDUL KADER SAHEB AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act—Act XV of 1877, ss 7, 8, sched II, art. 106—Suit by joint claimants, one being a minor—Bar of limitation saved as against all.

In 1885, five persons commenced to carry on business in partnership. In 1890, P (one of them) died. No accounts were taken, nor were the heirs of P

(1) Printed Judgments for 1887, p. 278.

(2) I L.R., 8 Mad., 214.

* Appeal No. 28 of 1900 against the decree of K. C. Mansvedan Raja, District Judge of North Arcot, in Original Suit No. 3 of 1898.

introduced as partners into the partnership. The four surviving partners continued to carry on the business. In 1891, C (one of them) died. No accounts were taken, nor were the heirs of C introduced as partners into the partnership. The three surviving partners continued to carry on the business. In 1898, the legal representatives of C instituted this suit against the surviving partners and the representatives of the deceased partners for an account and for a share of the profits of the partnership which was formed in 1890, on the death of P, and dissolved in 1891, on the death of C. The third plaintiff was a minor at the date of C's death, and was still in her minority at the date of suit. On its being contended that the suit was barred by limitation.

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Held, that the starting point for computing the period of limitation was the date of C's death. The present suit could not be regarded (within the meaning of article 106 of schedule II to the Limitation Act) as a suit in part for an account and a share of the profits of the original partnership. When a partnership is determined by death and the surviving partners continue to carry on the business, the Limitation Act is no bar to taking the accounts of the new partnership by going into the accounts of the old partnership which have been carried on into the new partnership without interruption or settlement.

Held also, that though the new partnership was dissolved by the death of C in 1891 and the suit would be barred, *prima facie*, by article 106 of schedule II to the Limitation Act, the bar was saved by sections 7 and 8 of that Act, inasmuch as the third plaintiff was and still continued a minor. The effect of section 8 was to save the bar in the case of all the plaintiffs, as they were joint claimants with the third plaintiff and none of them could give or could at any time have given the partners of C a discharge from liability to C's representatives without the concurrence of the third plaintiff.

The combined operation of sections 7 and 8 of the Limitation Act considered.

Baiber Maian v. Ramura Goudan, (I L R., 20 Mad., 461), discussed. The decision in that case held inapplicable to a case of co-heirs.

Seshan v. Rajagopala, (I L R., 13 Mad., 236) and *Kandhaya Lal v. Chandar*, (I L R., 7 All., 313), approved as to the construction of section 7 of the Limitation Act.

SUIT for an account of a partnership and for the recovery of plaintiff's share therein. The partnership business commenced in 1885, there being five partners, namely, first defendant, Chanda Mean, Pacha Mean, sixth defendant and Mathari Bavudin Sahab. Pacha Mean died in 1890, and the four survivors continued to carry on the business, but Pacha Mean's heirs were not introduced as partners into the partnership, and it seemed that no accounts were settled either with Pacha Mean or his heirs. In 1891, Chanda Mean died, whereupon the three surviving partners continued to carry on the business in partnership, the heirs of Chanda Mean not being introduced into it and no accounts being taken. Plaintiffs filed this suit in 1898, against the surviving partners and the representatives of the other deceased partners, for an account of the partnership. First plaintiff was the widow

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of Chanda Mean, and second plaintiff was the husband of third plaintiff. The latter was one of Chanda Mean's heirs, and was a minor at the date of Chanda Mean's death and was still in her minority at the date of suit. Defendants Nos 2 to 4 were children of the deceased Pacha Mean, and fifth defendant was his widow. Defendants Nos 7 to 10 were children of Mathari Bavudin (now also deceased), and eleventh defendant his widow. Defendants Nos 12 to 18 were entitled to shares in Chanda Mean's estate. The nature of the claim and the defence and other material facts are set out at length in the judgment. The District Judge dismissed the suit, holding that first defendant's business had not been carried on in partnership with Chanda Mean, and that the suit was barred by limitation.

Against this decree plaintiffs Nos. 1 to 3 proffered this appeal.

V Krishnasami Ayyar, R Subrahmanu Ayyar, T Venkatasubba Ayyar and Narayana Sastri for appellants

Sadagopa Charuar, Narasimha Ayyangar, and Venkaluchariar for respondents

BHASHYAM AYYANGAR, J.—It is alleged in the plaint that five persons, namely, the first defendant; one Chanda Mean, the deceased husband of the first plaintiff; one Pacha Mean, the deceased father of defendants Nos. 2 to 4, and husband of fifth defendant; the sixth defendant, and one Mathari Bavudin Saheb, father of defendants Nos 7 to 10 and husband of eleventh defendant, were carrying on partnership business at Ambur, the first-named three persons being brothers and the last named two being their brothers-in-law, and that on the death of Chanda Mean Saheb in August 1891 it was agreed that the first defendant and the other surviving partners should use the amount of capital and profits due to the share of Chanda Mean Saheb in carrying on the business of partnership, that interest thereon should be paid to plaintiffs at one per cent. per mensem, that the total amount due to the plaintiffs should be settled as per accounts and paid over to them on demand, and that the partnership business was accordingly carried on even after the death of Chanda Mean.

The plaintiffs and defendants Nos 12 to 18 are the legal representatives of the deceased Chanda Mean Saheb, including the legal representatives of a deceased heir of Chanda Mean. Plaintiffs bring this suit for taking an account of the profits of the partnership which was dissolved by the death of Chanda Mean in August

1891 and for recovering the share due to him in such profits with subsequent interest at 12 per cent. after giving credit for sums paid to first plaintiff, since the death of her husband, on account of interest. On behalf of the contesting defendants it is contended that the business carried on by the first defendant was his sole and exclusive business, that neither Chanda Mean Saheb nor any other person was a partner therein, that the agreement alleged to have been made with the plaintiffs on the death of Chanda Mean Saheb is false and that the suit is barred by the law of limitation.

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The District Judge dismissed the plaintiff's suit, holding that the first defendant's business and trade was not carried on in partnership with Chanda Mean Saheb and others, that the agreement alleged to have been made between the plaintiffs and the first defendant on the death of Chanda Mean Saheb is not true, and that the suit is barred by the law of limitation.

Against this decree plaintiffs appeal, and it is chiefly urged on their behalf that the facts found by the District Judge establish in law that the business was carried on by the first defendant in partnership with first plaintiff's husband and others and that the suit is not barred by the law of limitation by reason at any rate of the minority of the third plaintiff, one of the heirs of Chanda Mean Saheb. I agree with the learned pleader for the appellants that the District Judge substantially finds that the business was carried on in partnership though he nominally finds the first issue relating to partnership against the plaintiffs. [His Lordship dealt at length with the evidence and held that the business had been carried on in partnership.] The agreement alleged to have been made by the plaintiffs with the first defendant on the death of Chanda Mean Saheb is the subject of the second issue, and I concur with the District Judge that the oral evidence adduced by the plaintiffs to prove such an agreement is untrustworthy, and that no such agreement was entered into. If such agreement had been established, it would have afforded strong evidence of the alleged partnership. But as I have found the existence of the partnership, it becomes immaterial for the purposes of this suit whether the alleged agreement of 1891 is true or false, for it is undoubted law that "partners continuing to carry on business without coming to an account with their late partner or those who represent him, are liable to be charged either with the profits made by the use of his capital

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The next and the only remaining question to be considered is the issue of limitation which is the subject of the fourth issue. I am clearly of opinion that the suit is not governed by article 60 of the Limitation Act which relates to money deposited under an agreement that it shall be payable on demand, and I may also dismiss article 59 from consideration, especially as the alleged agreement of 1891 has not been established. The suit being really one for an account and a share of the profits of the partnership which was dissolved by the death of Chanda Mean in August 1891 with subsequent interest thereon, the article applicable to the case is article 106 of the Limitation Act. The facts material to this issue are the following:—That the partnership business commenced in 1885 with five partners already mentioned; that one of them, Pacha Mean, the father of defendants Nos. 2 to 4 and husband of the fifth defendant, died in August 1890; that the surviving four partners continued to carry on the same business, but that Pacha Mean's heirs were not introduced as partners into the partnership and apparently no account was settled either with Pacha Mean or his heirs, that while the four surviving partners were carrying on the business Chanda Mean died in August 1891, leaving numerous heirs, among whom the third plaintiff and her deceased sister, the wife of the second defendant, were minors, and that the surviving three partners continued to carry on the business in partnership, the heirs of Chanda Mean not being introduced as partners into the partnership. The first question which arises for consideration is whether the starting point for computing the period of limitation for this suit is the

(1) L.R., 26 I.A., 32; I.L.R., 23 Bom., 544.

death of Pacha Mean or the death of Chanda Mean. If the period is to be reckoned from August 1890 when Pacha Mean died, the cause of action having accrued to Chanda Mean who was then under no disability, the suit would be clearly barred by limitation, and the minority of certain of the heirs claiming under Chanda Mean will in no way affect the question of limitation. On the death of Pacha Mean in August 1890 there was a complete dissolution of the partnership (section 253, clause 10 of the Indian Contract Act), for it is not alleged or proved that there was a contract to the contrary antecedent to such dissolution, the existence of which contract would have barred the dissolution of the partnership, so far as the four surviving partners were concerned. The fact that the surviving partners did carry on the same business in partnership among themselves would only amount in law to the formation of a new partnership and the investing therein as capital the respective shares of the surviving partners in the profits of the dissolved partnership. The surviving partners, therefore, by thus continuing the business of the dissolved partnership dispensed with the taking of an account of the profits of the dissolved partnership for sharing its profits. The result will be that, in a suit for an account and share of the profits of the new partnership which was dissolved in August 1891, by the death of Chanda Mean, it will be necessary incidentally to take an account of the profits of the old partnership which by the death of Pacha Mean was dissolved in 1890, merely for the purpose of ascertaining the capital contributed to the new partnership by each of its four partners. The present suit is brought by the plaintiffs for an account and a share of the profits of the partnership which was formed in August 1890 and was dissolved in August 1891, and it cannot be regarded, within the meaning of article 106, as a suit in part for an account and a share of the profits of the partnership which was dissolved in August 1890 on the death of Pacha Mean. This very question was considered by the Court of Appeal in *Betjemann v. Betjemann* (1) by Lindley, L.J., Lopes, L.J., and Rigby, L.J., and they unanimously held, reversing the decision of Wright, J., that when a partnership is determined by death and the surviving partners continue to carry on the business, the statute of limitation was no

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(1) [1895] 2 Ch., 474.

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bar to taking the accounts of the new partnership by going into the accounts of the old partnership which have been carried on into the new partnership without interruption or settlement. The District Judge cannot therefore uphold the view of the District Judge that the suit, not having been brought within three years from the date of the death of Pacha Mean, is barred by the law of limitation. The District Judge further finds that even if the period of limitation is to be reckoned from the date of the death of Chanda Mean in August 1891 the suit is barred except in respect of the share of the third plaintiff who is a minor. - The District Judge is of opinion that the claims of the plaintiffs are separate and distinct, that section 8 of the Limitation Act has no application to the case, as the plaintiffs cannot be regarded as joint claimants or joint creditors, and that the third plaintiff cannot be considered to be barred inasmuch as neither the first nor the second plaintiff can give a valid discharge in respect of the share of the third plaintiff. Under article 106, the date of dissolution of the partnership is the time from which the period of limitation has to be reckoned, and at that time the third plaintiff, one of the heirs of the deceased partner Chanda Mean, was labouring under the disability of minority.

The cause of action for an account and share of the profits of the partnership which Chanda Mean had against his co-partners was only a single and indivisible one, and certainly if he had retired from the partnership, or if the partnership was otherwise dissolved during his life-time, he could have brought only one suit. On his death his right devolved upon all his heirs in several shares which are regulated by the Muhammadan law of inheritance. Though as between themselves their rights are several, yet so far as the ancestor's debtor is concerned his obligation is single and cannot be split up without his consent. The numerous heirs of the deceased creditor are only jointly entitled to enforce the right which the deceased creditor, if alive, could singly enforce. If by the death of the creditor the right and the correlative obligation are, as under the civil law, split into several so that each one of the heirs of the creditor can enforce the payment to him of his share of the debt, and the debtor is under a distinct obligation to each of the heirs of the creditor to discharge his several shares in the debt (see Pothier on 'Obligations,' volume I, part II, chapter IV, section 2, article 2, page

179,—also translation of an extract from Demolombe's *Traité des Contrats* quoted in *Kandhya Lal v. Chandar*(1)), each of the heirs will have to bring a separate suit against the debtor and all the heirs cannot join as plaintiffs in one suit against the debtor (*Smurthwaite v. Hannay*(2)), and section 7 of the Limitation Act will be applicable only to such of the heirs as are affected by disability and no question of the competency of a co-claimant to give a complete discharge can arise, inasmuch as the claim of each co-heir is a distinct and several one. Conversely, under the civil law the obligation and the correlative right are also split into several, if the debtor dies leaving several heirs. Neither the English law nor the Indian law has followed the civil law in this respect,—and it is unnecessary to refer here to the limited class of cases in which, under the English or Indian law, an apportionment takes place on a transfer of property in several shares (vide *Twynam v. Pickard*(3), section 37, Transfer of Property Act, and section 30 of the Indian Easements Act), nor to claims to realty, nor to cases in which the covenantees are tenants in common. A question similar to the one now under consideration arose in the case of *Kandhya Lal v. Chandar*(1), in which two out of several heirs of a deceased Hindu brought a suit for the recovery of their $4\frac{1}{2}$ anna share in the debt due to the estate of the deceased. It was held by the Full Bench (Mahmood, J., dissenting) “that when, upon the death of “the obligee of a money bond, the right to realise the money has “devolved in specific shares upon his heirs, each of such heirs cannot “maintain a separate suit for recovery of his share of the money due “on the bond.” I fully concur in the judgment of the majority, but in arriving at their conclusion I am influenced mainly by the general principles of English and Indian law bearing on the question and a consideration of the serious hardship and inconvenience which will result from a contrary doctrine in the case of Hindus and more particularly in the case of Muhammadans, and, in dissenting from the judgment of Mahmood, J, I do not attach the same weight as the majority of the Full Bench do to the provisions of the Succession Certificate Act. The principle of the above decision applies with greater force to the present case in which the claim is for an account of the share of a deceased partner

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(1) I L R., 7 All, 313 at p 324

(2) [1894] A.C., 494.

(3) 2 B. & Al., 105.

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in the profits of a dissolved partnership and not for a share of an ascertained sum or debt, as in the Allahabad case. Under the English law the question has occasionally arisen in respect of co-parceners, who correspond to co-heirs under the Hindu law or Muhammadan law, for in other cases under the English law the legal representative of a deceased person is either an executor or an administrator. In *Decharms v. Horwood*(1), it was held that one co-parcener cannot sue separately for his portion of rent accruing to him and his fellows, Tindal, C J., stating the law on the subject as follows:—"The authorities all agree that whatever be the number of parceners, they all constitute one heir. They are connected together by unity of interest and unity of title; and one of them cannot distrain without joining the others in the avowry. If they cannot distrain separately, how can they separately claim a portion of the rent from a person who has received it in the character of a trustee? It would be a great hardship on him to be exposed to three actions instead of one. But it might happen that he might have received authority from the other parceners. Inasmuch, therefore, as there has been no division of these rents, nor any agreement by the defendant to hold one-third of them separately for the plaintiff he has no right separately to sue the defendant." Freeman in his treatise on 'Co-tenancy and Partition,' 2nd edition, page 427, section 336, lays down the same proposition as follows, citing American decisions also on the point:—"If a covenant of general warranty be broken by the eviction of heirs of the covenantee they must jointly sue the covenantor. He is not liable to as many suits as there are heirs of his grantee."

In *Foley v. Addenbrooke*(2), there was a joint demise by Edward Foley and his wife and Mary Whitby, and the covenants were with the said three persons and the heirs and assigns of the wife and Mary Whitby respectively. It appears that Edward Foley and his wife were the owners of an undivided moiety, and Mary Whitby of the other undivided moiety and that on the death of Edward Foley and his wife, the reversion in their undivided moiety descended to the plaintiff as the son and heir of the wife of Edward Foley who, without joining the other lessor Mary Whitby, brought the suit. It was held that the cause of action was joint and that both the covenantees ought to have sued, though as between

(1) 10 Bing, 526 at p. 529.

(2) 4 Q.B., 197.

themselves their interest might be separate; and the principle on which the decision was based is that "if the cause of action be joint, the action should be joint, though the interest be several."

Whatever doubts may arise on the construction of an instrument as to whether a covenant in favour of two or more persons, parties to the instrument, whether in their character as tenants in common, co-heirs or otherwise, is joint, several, or several according to their respective interests—and under the English law, unlike the civil law, a covenant in favour of two or more cannot be both joint and several, except perhaps in a single instance, which need not be referred to here (*Keightley v. Watson*(1); *Slingsby's Case*(2); *Eccleston v. Clapham*(3); *Bradburne v. Botfield*(4))—there can be no doubt that a single cause of action cannot be divided into several causes of action against the obligee without his privity, though two or more persons may have several interests in the right giving rise to the cause of action, whether such persons be joint covenantees or the heirs of a single covenantor. Exceptions to this rule generally rest on statutory provisions and their nature has been already indicated. When a right accruing to a single person from a covenant in his favour devolves, on his death, on two or more of his heirs in several shares, no question can possibly arise as to whether the covenant was joint or several, and the only difference caused by the death of the covenantor is that the cause of action which resided in one person, is, by operation of law, transferred to a number of parceners, who, as observed by Tindal, C.J., in *Decharms v. Horwood*(5), constitute one heir. In other words, the claim which was possessed by one individual is now possessed jointly by a number of individuals, who are his legal representatives and all must therefore join in a suit to enforce that claim. If one or more of such joint claimants do not join as plaintiffs, the course to be pursued in India, according to long-established course of decisions, is for the claimants bringing the suit to join, as party-defendants, those who do not join as plaintiffs. The cause of action for taking an account and recovering Chanda Mean's share of the profits of the partnership which was dissolved by his death in 1891, being one and indivisible, as against the surviving partners, it necessarily follows that the suit cannot be barred in

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(1) 3 Exch., 716 at p. 723.

(2) Coke's Rep., part V, p. 185.

(3) 1 Wilham's Notes to Saunders's Rep., pp. 162-63.

(4) 14 M. & W., 559.

(5) 10 Bing., 526 at p. 529.

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respect of some of his heirs and not barred in respect of the others. It must be either wholly barred or not barred at all. This is the principle underlying sections 7 and 8 of the Indian Limitation Act, which in this respect is, I believe, the same as the English law of limitation.

The law of limitation operates in favour of the obligor and if the obligation which is sought to be enforced against him is single and indivisible it is perfectly immaterial, so far as he is concerned, whether the correlative right is possessed by a single person, or by several persons jointly and whether, as between those several persons, the right is a joint one with right of survivorship or a several one according to their respective interests. Section 7 of the Limitation Act applies to cases in which the right of suit resides either in one person singly or in several persons jointly. In the former case, only one individual has to bring the suit, but in the latter case, the suit has to be brought by all the persons who possess that right except that in those cases in which one or more of them refused to join as plaintiffs, they may be and ought to be joined as party defendants; and for the purposes of section 7, all such persons have to be regarded as plaintiffs. In the case of a sole plaintiff affected by disability, the application of the section is clear and it is in no way controlled by section 8. In cases in which the right of suit vests jointly in a plurality of persons, I am clearly of opinion that if section 7 stood by itself, and section 8 had not been enacted, the protection given by section 7 would extend only to cases in which each and all of the persons jointly entitled to sue were affected by disability at the time from which the period of limitation is to be reckoned and that if any one of them was then free from disability, the suit would be governed by the ordinary law of limitation and that section 7 cannot be availed of by all or any or them, for the simple reason that the cause of action is a joint one. This is the construction placed by this Court on section 7 taken by itself in *Seshan v. Rajagopala*(1) following the decision of Lord Kenyon in *Perry v. Jackson*(2), and if I may venture to say so, I fully concur in the soundness of this construction of section 7, notwithstanding that such construction has been apparently dissented from by the other High Courts (*Surja*

(1) I.L.R., 13 Mad., 236.

(2) 4 T.R., 516 at p. 519.

Kumar Dutt v. Arun Chunder Roy(1); *Zamir Hassan v. Sundar*(2), and *Govindram v. Tata*(3). The operation of section 7, however, is extended and modified by section 8, which deals with cases in which the right of suit resides jointly in a plurality of persons, and its object is principally to extend the protection given by section 7 to cases in which the persons entitled to sue were not all affected by disability at the time when the right to sue accrued, but only one or some of them were so affected and the others not. The protection given by section 7 is extended to this class of cases, not absolutely, but subject to the important condition that a complete discharge of the obligation could not be given by all or any of those unaffected by disability without the concurrence of the person or persons so affected. If such a discharge could be given time will run against all the persons (including the person or persons affected by disability), and the suit will be governed only by the ordinary law of limitation. This clearly follows from the first part of section 8. The latter part of section 8 provides that if no such discharge can be given, time will not run as against any of them, until one of them becomes capable of giving such discharge without the concurrence of the others. This latter part relates to a case in which, though all were affected by disability at the time from which the period of limitation is to be reckoned, yet one of them whose disability terminates before the disability of the others becomes capable of giving a complete discharge of the obligation, without the concurrence of those still labouring under disability (*vide* illustration (b) to section 8). But for this provision, made by the latter part of section 8, time will begin to run under section 7, not from the time when one of them ceases to be under disability and becomes capable of giving a discharge without the concurrence of the others, but only from the time when the last of such persons has ceased to be under disability. Section 8 does not expressly provide that in a case in which one or some alone of the persons entitled to sue were affected by disability at the time when the cause of action accrued to all the persons entitled, time will not run as against any of them, unless a complete discharge of the obligation could be given by one or more of the persons free from disability, without the

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(1) I L R., 28 Calc., 465

(2) I L R., 22 All., 199.

(3) I L R., 20 Bom., 383.

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concurrence of the person or persons labouring under disability. But this is necessarily implied in the section. The combined operation of sections 7 and 8 in cases in which the right of suit resides jointly in a plurality of persons is, in my opinion, as follows:—(a) such suit cannot be barred in part, in respect of some, and not barred in part, in respect of the others; (b) if any one of several joint creditors or claimants is under a disability and a full discharge could be given without his concurrence by all or any of the other joint creditors or claimants, the suit will be governed by the ordinary law of limitation and time will run against all; (c) but where no such discharge can be given, time will not run against any of them, until all have ceased to be under disability; (d) if all were affected by disability, time will not run against any of them, until all have ceased to be under disability, unless one of them, who, in the meanwhile, has ceased to be under disability, becomes capable of giving a complete discharge without the concurrence of the others, in which latter case, time will run against all from the time when one of them has thus become capable of giving such discharge.

In the present case among the heirs of Chanda Mean at least one of them, viz., third plaintiff, was a minor, in August 1891, the other heirs having, prior thereto, attained the age of majority. If it was competent for any of the major heirs, without the concurrence of the third plaintiff, to discharge the surviving partners from liability to account for the share of Chanda Mean, in the profits of the partnership, the case would fall under class (b) above and would be completely barred by limitation. But if neither all nor any of the heirs who were *sui juris* were competent to bind the third plaintiff by their discharge, the case would fall under class (c) above, and the suit will not be barred by limitation as against any; and in fact it would be in time, if brought within any period not later than three years after the third plaintiff attains the age of majority. In the case of joint promisees it was no doubt held, following the English law, in the case of *Barber Maran v. Ramana Goundan*(1) that a release by one of them, without the knowledge or concurrence of the other or others, will bind the latter. The authority of this decision, so far as the principle laid down therein was applied, as it was in that case, to co-mortgagees, as such, is

(1) I.L.R., 20 Mad., 461.

considerably shaken by the recent decision of the Court of Chancery in *Powell v. Brodhurst*(1) It may be that when money is advanced to one, by several persons jointly, each of them authorises the others, by implication, to act on his behalf, and a release or discharge therefore, of the claim, by one, is binding upon the others. Assuming that the principle of the English common law as to the operation of a release given by one of two or more joint promisees, is not affected by the Indian Contract Act, and is the law here, as held in *Barber Maran v. Ramana Goundan*(2) already cited, it is clearly inapplicable to the case of co-heirs, who are not joint promisees but the heirs of a single promisee, and it will be dangerous to extend and apply the English doctrine to a release given by one of such co-heirs. Mahmood, J., in his dissenting judgment in the Full Bench case already referred to, maintains that as between co-heirs none of them can receive the whole, for the others, nor give a discharge to the debtor. It is obvious that such is the law and I fully concur with that learned Judge that a co-heir cannot, as such, give a valid discharge binding upon the other co-heirs. In the case of co-heirs, among Hindus, the Hindu law, as a general rule, constitutes one of them, the senior in age, as the karta or manager of the inheritance on behalf of all the co-heirs; and it has been held that the managing member of an undivided Hindu family is one who, within the meaning of section 8 of the Limitation Act, can give a discharge without the concurrence of the minor members of the family, and that time therefore will run against all the members of the undivided family including the minor member thereof—vide *Surju Prasad Singh v. Khwahish Ali*(3) and *Vigneswara v. Bupayya*(4). But, under the Muhammadan law, none of the co-heirs is given the position which the managing member of an undivided Hindu family holds with reference to his co-heirs. The discharge contemplated by section 8 of the Limitation Act, is by one or more of the joint creditors or claimants, by virtue of their being such creditors or claimants. The fact, if fact it be, that a minor's guardian, who also happens to be a co-claimant with the minor, can, in his or her capacity as such guardian of the minor, give a discharge binding the minor, is not a discharge within the purview of

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(1) [1901] 2 Ch, 160.

(3) I.L.R., 4 All., 512.

(2) I.L.R., 20 Mad., 461.

(4) I.L.R., 16 Mad., 436.

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section 8, and limitation therefore will not run against any of the creditors or claimants. It may also be mentioned that the test under section 8 is not whether a suit can be brought or an application can be made without the concurrence of the joint creditor or claimant labouring under disability,—for in the case of a joint claim the right of action resides in all jointly and the suit cannot therefore be brought, nor the application made as of right, by one or more without joining the others,—but whether one or more, can, without the concurrence of those under disability, give a release binding upon all. In my opinion the finding of the District Judge that suit is barred by the law of limitation, cannot be upheld and he ought to be directed to take an account and submit his findings on the third and fifth issues within three months from the date of the receipt of this order

BENSON, J.—I fully concur with the judgment which has just been delivered.

The plaintiffs, as the representatives of the deceased, Chanda Mean, sue for an account of his partnership with the first defendant and others

The District Judge, though finding that there was no such partnership, has set forth in his judgment what seem to me to be conclusive reasons for holding that there was, in fact, such a partnership. It was dissolved by the death of Chanda Mean in August 1891. *Prima facie* the present suit brought in 1898 for an account of the partnership would be barred by article 106 of schedule 2 of the Indian Limitation Act, which requires such a suit to be brought within three years from the date of the dissolution of partnership. The bar by limitation is, however, saved by sections 7 and 8 of the Limitation Act inasmuch as the third plaintiff, one of the children of Chanda Mean was a minor in August 1891 and is still a minor. If she was the sole representative of Chanda Mean her suit would be saved from limitation by section 7 of the Act; and the effect of section 8 of the Act is to save the bar in the case of the other plaintiffs also, inasmuch as they are joint claimants with the third plaintiff and none of them could give, or could have at any time given, the partners of Chanda Mean a discharge from liability to Chanda Mean's representatives without the concurrence of the third plaintiff. The District Judge is in error in supposing that the plaintiffs have several or separate rights of action according to the shares in which they are entitled

to the property of Chanda Mean. *Inter se*, no doubt, they are entitled to have separate shares in that property, but for the purpose of recovering the share of the partnership assets due to Chanda Mean their cause of action is one and indivisible and they cannot each maintain a separate suit, but must sue jointly as his representatives (*Kundhya Lal v. Chundar*(1)) If, as in this case, some of the representatives are unwilling to sue they may be joined as defendants, so that all may be bound by the decree, and save the debtors from the liability to a series of actions on the same cause of action. The plaintiffs' suit, then, for an account of Chanda Mean's share of the assets of the partnership dissolved by his death in 1891 is not barred by the law of limitation. In order to ascertain his share in that partnership it is necessary to ascertain the amount of capital which he and the other partners put into the partnership business, and for this purpose it is open to the parties to go into the accounts of the prior partnership which was put an end to by the death of Bacha Mean in 1890, since it is admitted that on his death the remaining partners, including Chanda Mean, continued to carry on the partnership with the capital then employed in it—[Lindley on 'Partnership,' 5th Edition, (1888), pp. 520-521]

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For these reasons I am of opinion that the dismissal of the plaintiffs' suit was wrong, and that we must ask the District Judge for a finding on the third and fifth issues in order to determine whether any sum, and, if so, what is due to the plaintiffs.

I concur in the order proposed by my learned colleague.

(1) I L.R. 7 All, 313.

APPELLATE CIVIL.

Before Mr Justice Benson and Mr Justice Bhashyam Ayyangar.

1901.
August, 21,
23

BHIMARAJU CHETTI (PLAINTIFF), APPELLANT,

SRI KUNJA BEHARI GAJENDRA DEVU AND OTHERS
(DEFENDANTS), RESPONDENTS *

Mortgage—Construction of deed—Mortgage quâ zamindar—Right of mortgage in village not held quâ zamindar—Absence of express provision in deed charging such right—Not comprised in mortgage.

By a deed of mortgage, dated 22nd October 1892, a zamindar mortgaged to plaintiff his entire zamindari, which was recited as yielding a certain annual income, together with the zamindar's "entire right and income and the kattubadis on enfranchised inams." The schedule specified by name the villages constituting the zamindari, one of these being the village of Sabuhya. The only right, title and interest possessed by the zamindar in this village, (which was an inam village of certain Payaks), was to the annual payment by the inamdars of a fixed kattubadi, and the amount of this kattubadi was all that was included in the approximate annual income specified in the schedule. At the date of the mortgage to plaintiff, the zamindar also possessed a mortgage right over this village, he being the assignee of a mortgage which had been executed by the Payaks, (the inamdars), in 1874, the assignment having been made to him in 1889. In a suit brought against the zamindar in 1888 by plaintiff, on his mortgage, plaintiff contended that the deed operated to assign to him, by way of mortgage, not only the zamindar's right to kattubadi in respect of the village of Sabuhya, but also the mortgage right possessed by the zamindar over that village.

Held, that the zamindar's mortgage right over the village Sabuhya was not comprised in the mortgage.

Rooke v. Lord Kensington, (25 L J, (Ch), 795), referred to.

Suit for money due on a mortgage. Plaintiff alleged that the father of first defendant, acting for himself and as guardian of first defendant, had executed in plaintiff's favour a mortgage over the zamindari of Palur for Rs 90,000, which sum had been duly advanced; that first defendant's father had died two years prior to the suit without discharging the debt or any portion of it; and that first defendant, who had succeeded to the zamindari, was liable for the debt, and that defendants Nos 2 to 8 were also mortgagees of portions of the zamindari, some of them holding prior and some subsequent mortgages. He alleged that a village of the name of

* Appeal No. 62 of 1900 against the decree of F. Murray, District Judge of Ganjam, in Original Suit No. 9 of 1899.

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Sabuliya, being one of those mortgaged to plaintiff, had been sold at a date subsequent to plaintiff's mortgage at a Court auction at the instance of ninth defendant, in execution of a decree obtained in Original Suit No 44 of 1894, by first defendant's father against certain Payaks, who claimed to be the owners of the village, and that it had been purchased by ninth defendant, who was accordingly impleaded in this suit. Plaintiff claimed that whatever interest first defendant's father might have had in the said village had become mortgaged to plaintiff, under his mortgage deed, and that the interest which ninth defendant had acquired in the village must be subject to plaintiff's interest. He asked for a decree directing payment of the mortgage amount together with interest, and in default of payment, that the mortgaged property should be sold subject to certain mortgages which plaintiff admitted were prior to his own. First defendant put plaintiff to proof of his allegations. Defendants Nos 2, 5, 6 and 7 filed statements which are not material to the point decided. Ninth defendant claimed the village of Sabuliya by virtue of his purchase at the Court sale. He alleged that the Payaks, as the original owners of that village had mortgaged it with possession to one Brindavana Doss for thirty years; that Brindavana Doss had died ten years after the date of that mortgage; whereupon, in 1889, his son and widow had assigned the mortgage to the zamindar of Palur, who, being out of possession, brought Original Suit No. 44 of 1894 on the mortgage bond, and obtained a decree in 1895. This decree had been assigned by the zamindar in 1896 to ninth defendant, who executed it in 1897, brought the village to sale, and purchased it in 1898 in a Court auction. He contended that the zamindar had no right to mortgage this village to plaintiff, and, in fact, had not done so, and that the mortgage deed executed in plaintiff's favour did not purport to mortgage or assign to plaintiff the zamindar's limited interest, as mortgagee, in the village. He asked that it should be exempted from liability under plaintiff's mortgage.

The mortgage deed which bore date the 22nd October 1892 commenced with the words "Deed of mortgage in respect of a zamindari," and after reciting the objects for which the loan was raised, and giving various undertakings, continued as follows:—
"In respect of the principal, interest, &c., of this document are mortgaged the following:—The entire zamindari of Palur, which

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is situate in Chattrapur Sub-Registry of Ganjam district, which has passed to our possession from our ancestors, which is in our possession and enjoyment, which yields an annual income of about Rs. 9,975, which is described in detail in schedule No. 1 herein, on which is payable annually a peishkush of Rs. 22 and a land-cess of Rs. 463, and which bears zamindari patta No. 364, together with the hills, jungles, cultivated and uncultivated lands, gardens, sources of irrigation, &c, as well as with our entire right and income and the kattubadis on enfranchised inams,—these are mortgaged to you subject to the mortgages mentioned in schedule No. 2, but they are retained in our possession."

The second schedule specified twenty-nine villages by name, the fourteenth being that of Sabuliya. Further facts relating to this village and the rights possessed by the zamindar in respect of it, are to be found in the judgment of the High Court.

The fifth issue was—"Whether plaintiff possesses the rights of a sub-mortgagee over the village of Sabuliya and whether the same is not entitled to priority over the ninth defendant's subsequent purchase at the Court sale in Original Suit No. 44 of 1894 on the file of this Court?" On this issue the District Judge found as follows:—"The plaint bond purports to and does assign to plaintiff all the zamindar's right, title and interest of whatever nature in the whole of his zamindari and every part of it; it must therefore be concluded to embrace what those rights are in Sabuliya village. Even ninth defendant by his vakil admits that this village is an inam village over which, however, (*vide* exhibits I and IA), the zamindar has the right of collecting kattubadi. Defendant No. 9 objects that it was mortgaged in the plaint bond (exhibit A) as a jirayati village and this may have been done so under a mistake for it is not a jirayati one, and plaintiff himself in the box admitted he knew nothing about this village, as it was his clerk who made inquiries. The zamindar having original kattubadi right which he has never been divested of, afterwards acquired the inam right in 1889 and by decree in Original Suit No. 44 of 1894 got a decree for the village and transferred it to ninth defendant, but this transfer would not do away with the zamindar's right to collect kattubadi, and as the zamindar mortgaged all his rights to the plaintiff, it follows that plaintiff has a mortgage lien on this right also. Thus, no doubt, so far, plaintiff would be in the position of a sub-mortgagee—*vide Muthu Vija*

Raghnatha Ramachandra Vacha Mahali Thurai v. Venkatachallam Chetti(1) It is quite clear, therefore, the Sabuliya village cannot go free from plaintiff's claim. The suit deed was drawn up in 1892, long before the ninth defendant came on the ground with his transfer decree and obtained what rights he did obtain in the village. I, therefore, pass to my finding on the fifth issue, which is that plaintiff possesses the rights of a sub mortgagee in Sabuliya village to the extent that he may collect the kattubadi therefrom and that in so doing he is entitled to priority over the ninth defendant's subsequent purchase at the Court sale in Original Suit No 44 of 1894 on the file of this Court, so far as that right to collect kattubadi extends "

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He decreed in plaintiff's favour for payment of the amount claimed, and in default of payment within six months that the mortgage property be sold subject to the prior mortgages admitted by plaintiff.

Against this decree plaintiff preferred this appeal.

Sundara Ayyar for appellant—At the time of the mortgage to plaintiff the zamindar held a mortgage of the village of Sabuliya. This village is included in the schedule of properties appended to the mortgage deed. It was described as a jirayati village. The question, therefore, is whether the zamindar's right as mortgagee of the village was also mortgaged to plaintiff or, in other words, whether plaintiff is a sub-mortgagee under the zamindar of the village of Sabuliya, besides being the mortgagee of the kattubadi payable to the zamindar in respect of it. The plaintiff contends that both rights have passed to him, under the deed, as mortgagee. The words "entire right and income" show that not only rights *quâ* zamindar, which were sufficiently described by the preceding words, but also all rights possessed by the zamindar at the time, whether they were *quâ* zamindar or not, within the limits or ambit of the zamindari, passed to the plaintiff. What was meant by the document read as a whole was that all the rights of the mortgagor within the geographical limits were thereby mortgaged. The fact that the title-deeds of the zamindar's mortgage right were not handed over to plaintiff cannot affect him. If, on a construction of the document, the plaintiff was entitled to the full rights in the village, they cannot be cut down by this

(1) I.L.R., 20 Mad., 35.

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circumstance only. [He cited *Early v. Rathbone*(1); *Land Mortgage Bank of India v. Abul Kasim Khan*(2); *Mohunt Kishen Geer v. Busgeet Roy*(3)]

V. Krishnasami Ayyar and V. Ramesam for respondent (ninth defendant)—The schedule to the mortgage deed shows that the income of the village of Sabuliya and thirteen other villages is Rs. 3,000. It is therefore clear that the right to take kattubadi alone was meant and the description in another column referring to Sabuliya as jirayati is erroneous. The mortgage instrument was headed "zamindari mortgage." This clearly shows that rights of the zamindar alone, *quâ* zamindar were mortgaged. Again it is clear that as the mortgage debts owed by the zamindar were specifically mentioned in another schedule to the instrument, those owing to him would have been mentioned if they had been intended to be affected by the instrument. The reference to the number of the patta, the peishkush and the permanent settlement shows also that rights *quâ* zamindar (excluding inams) were mortgaged. The special reference to "kattubadi on enfranchised inams" made in the instrument, is superfluous if the geographical limits were meant by the preceding description. [Reference was made to *Rooke v. Lord Kensington*(4); *Chapman v. Gatcombe*(5); *Francis v. Minton*(6).]

JUDGMENT.—The instrument of simple mortgage, dated 22nd October 1892, on which the suit is brought by the plaintiff, the mortgagee, for the recovery of the mortgage debt by sale of the mortgaged property, purports to be a zamindari mortgage, the property mortgaged being the zamindari of the mortgagor, described in schedule No. 2 annexed to the mortgage instrument. The operative part of the instrument of mortgage runs as follows:—

"In respect of the principal, interest, &c, of this document are (mortgaged) the following:—The entire zamindari of Palur, which is situate in Chattrapur Sub-Registry of Ganjam district, which has passed to our possession from our ancestors, which is in our possession and enjoyment, which yields an annual income of about Rs. 9,975, which is described in detail in schedule No. 2 herein, on which is payable annually a peishkush of Rs. 22 and a land cess of Rs. 463, and which bears zamindari patta No. 364,

(1) 58 L.T., 517.

(3) 14 W.R., (C.R.), 379.

(5) 5 L.J., (C.P.), 93.

(2) I.L.R., 26 Calc., 395.

(4) 25 L.J., (Ch.), 795.

(6) L.R., 2 C.P., 543.

"together with the hills, jungles, cultivated and uncultivated lands, gardens, sources of irrigation, &c, therein, as well as with our entire right and income and the kattubadis on enfranchised inams, —these are mortgaged to you subject to the mortgages mentioned in schedule No. 2, but they are retained in our possession."

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Schedule No 2 specifies the twenty-nine villages constituting the zamindari, with the approximate extent and yearly income thereof, one of such villages (No. 14) being Sabuliya. That village is an inam village of certain Payaks, in which the only right, title and interest which the mortgagor, as zamindar of Palur, possesses, is to the annual payment, by the inamdars, of a fixed kattubadi of Rs. 70, and apparently this is all that is included in the approximate annual income specified in the above schedule. At the date of the mortgage, the zamindar also possessed a mortgage right in the said village, being the assignee, apparently, of a simple mortgage, made in 1874, by the Payaks, the inamdars, to one Brindavana Doss, who in 1889 assigned the mortgage to the zamindar.

The only question raised and argued in the appeal is whether, so far as the village of Sabuliya is concerned, the only interest therein, which was assigned by way of mortgage, to the plaintiff, is the zamindar's right to kattubadi, or also the mortgage right possessed by the mortgagor, as assignee of the mortgage granted by the inamdars. It is contended on behalf of the appellant that he is a sub-mortgagee, under the zamindar, of the village of Sabuliya, besides being the mortgagee of the kattubadi payable to the zamindar in respect of it. The question we have to decide is, whether the property mortgaged is the zamindari estate of Palur, or the properties of the mortgagor, situate within the territorial limits of the zamindari. The plaintiff in his evidence admits that he was neither informed, nor otherwise aware of the mortgage interest, which the zamindar had in the above village of Sabuliya; but that whatever rights were possessed by him in the said village were mortgaged to him. He also says in his evidence that he cannot say whether the zamindar handed to him the mortgage deed executed by the inamdars and the deed assigning that mortgage to him. There is little doubt that those documents were not handed to the plaintiff, but retained by the zamindar himself. The zamindar, as assignee of that mortgage, brought a suit against the Payaks, the inamdars, in Original Suit No. 44 of 1894, and obtained a decree on the footing of that mortgage. The ninth

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respondent obtained an assignment of that decree and, in execution thereof, became the purchaser, in 1898, of the village of Sabuliya. The plaintiff was not a party to the said suit, and unless the zamindar acted fraudulently in bringing the said suit to enforce the mortgage granted by the inamdars, it is clear that the zamindar did not consider that he had sub-mortgaged the village to the plaintiff. Though the zamindar did not intend to assign his mortgage right in the village by way of sub-mortgage to the plaintiff and he did not consider that he had done so when he brought Original Suit No. 44 of 1894, and though the plaintiff himself was not aware of the mortgage right which the zamindar had in the said village and did not obtain possession of the original mortgage deed, yet, if it appeared clearly, from the instrument of mortgage, that all the interests possessed in fact and law by the mortgagor, in the village of Sabuliya, were assigned to the plaintiff by way of mortgage, it is immaterial that the zamindar did not really so intend and that the plaintiff was not aware of the exact interest which the zamindar had in that village. The determination of the question therefore depends mainly upon the right construction of the instrument of mortgage. The transaction purports to be a simple mortgage of the zamindari of Palur, which bears zamindari patta No. 364, and which has passed to the possession of the zamindar from his ancestors, yielding an annual income of about Rs 9,975 (the particulars of which are given in schedule 2 appended to the mortgage instrument), subject to a fixed peishkush of Rs 22, together with the hills, jungles, cultivated and uncultivated lands, gardens, sources of irrigation, &c., therein, as well as with the zamindar's entire right and income and the kattubadi on enfranchised inams. It is clear that the entire zamindari of Palur, bearing patta No 364 and subject to a peishkush of Rs. 22. which was mortgaged, is the estate of Palur, which was permanently settled on zamindari tenure under Regulation XXV of 1802. The village of Sabuliya was at the time of the permanent settlement, a jaghir or inam held by the Payaks, subject to the payment of a kattubadi to the zamindar. Under the said Regulation, the permanent settlement was exclusive of the inam (*vide* section 4), and included only the kattubadi, which alone was taken as part of the assets of the zamindar.

The interests which the mortgagor possessed in the village, at the time of the mortgage, were two-fold—one, the right to the

payment of the kattubadi, and the other, his right as a simple mortgagee under the Payaks, the inamdars of the village. The former right alone belonged to him *quâ* zamindar, and was an incident of the zamindari tenure and would be comprised in the expression—"with our entire right and income"—occurring in the mortgage instrument. The latter right, as mortgagee, he did not possess, *quâ* zamindar, and it was not an incident of the zamindari tenure, *i.e.*, of the estate as permanently settled under the Regulation. It is evident that the zamindari of Palur is referred to in the mortgage deed, as an estate permanently settled, subject to the payment of a fixed peishkush and not in a geographical sense, as comprising every kind of right, title and interest, which the mortgagor may have possessed, within the local limits of the zamindari. This is placed beyond all reasonable doubt, by the express inclusion in the mortgage of kattubadis or quit-rents payable on enfranchised inams, situate within the zamindari limits. Such quit-rents, which were imposed when the inams were enfranchised in this Presidency, are payable to Government, but the right to collect the same appears to have been assigned by Government for administrative reasons to the zamindar himself, in consideration of his undertaking to pay to Government an amount equal to 90 per cent. of such quit-rents, the remaining 10 per cent. being intended as compensation for the trouble and risk involved in the collection of the quit-rent. If the expression "with our entire right and income" had reference to the zamindari in its geographical sense, and not merely to the estate held on zamindari tenure, the express inclusion of quit-rents on enfranchised inams would be superfluous. But, as the right he had to such quit-rents was not possessed by him, *quâ* zamindar, and it did not form an appurtenance of the zamindari, it had to be expressly included, to give effect to the intention of the parties, that the mortgage should comprise also the right to such quit-rents. The parties, therefore, would also have expressly included the zamindar's simple mortgage right in the village of Sabuliya, if their intention was to include that right also in the mortgage. This construction of the instrument of mortgage receives support from the conduct of the parties, in that the plaintiff did not obtain possession of the original mortgage deed, and in that the zamindar himself subsequently brought a suit upon the mortgage deed against the Payaks in Original Suit No. 44 of 1894. If the instrument in question had

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been an outright sale of the zamindari and not a mere mortgage, it could hardly be seriously contended that the zamindar's mortgage interest in the village would pass under such conveyance.

The case of *Roche v. Lord Kensington*(1), which was cited on behalf of the respondent, is a strong authority in support of his contention. In that case, Lord Kensington, the mortgagor, after specifying certain properties, which were mortgaged, also conveyed by way of mortgage, "all other, the lands, tenements and hereditaments (if any), in the County of Middlesex." At the date of the mortgage, the mortgagor was seized in fee of a manor at Killahan in the County of Middlesex; and the question arose whether the mortgage instrument conveyed to the mortgagee that manor also. It was held that it did not, Vice-Chancellor Wood observing as follows:—"I think the clear intent and purport must be held to be simply a sweeping in of other property *ejusdem generis* with the property which had been so conveyed, if any there should be; certainly not to include a copyhold property, and manorial rights in property of a totally different character from anything attempted to be conveyed or specified throughout the deed."

The appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Bhashyam Ayyangar.

1901.
March 20.

KOTAPPA (PLAINTIFF), APPELLANT,

v.

VALLUR ZAMINDAR (DEFENDANT), RESPONDENT.*

Limitation Act—Act XV of 1877, sched. II, art. 116—"Contract in writing registered" signed by one party thereto—Plaint—Sufficient disclosure of cause of action.

During the course of certain litigation in which B was suing A on a promissory note a compromise was arrived at under which A undertook to execute

(1) 25 L.J., (Ch.), 795.

* Second Appeal No. 1454 of 1899, against the decree of P. S. Gurumurthi Ayya, Subordinate Judge of Kistna, in Appeal Suit No. 543 of 1898, reversing the decree of A. Ramaswami Sastri, District Munsif of Masulipatam, in Original Suit No. 336 of 1896.

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a mortgage in favour of B and, in consideration thereof, B undertook to withdraw an appeal which was pending at the time. The mortgage was executed, and the undertaking to withdraw the appeal was embodied in the mortgage deed, which was registered, but signed only by A. B, in breach of his undertaking, permitted the appeal to proceed, and obtained a decree on 20th November 1891, which he subsequently executed against A, recovering the value of the promissory note upon which he had originally sued. He also retained the mortgage which had been executed in the compromise. A now sued to recover from B the amount which B had collected under the decree, stating the cause of action as having arisen on the date of that collection, namely, 29th October 1893, when it was contended that the suit was not maintainable inasmuch as the decree had not been set aside, and that even if treated as a suit for damages for breach of the undertaking to withdraw the appeal, it was barred, as the date of the breach was the date of the decree, (viz., 20th November 1891), which had been wrongly obtained, and this suit had not been brought within three years from that date, the plaint having been filed on 14th September 1896:

Held, that inasmuch as all necessary allegations were made in the plaint, the contract and its breach being alleged, and as the defendant understood what the claim against him was, the plaint sufficiently disclosed a cause of action for damages for the breach of contract

Held also, that the undertaking in the mortgage was "an agreement in writing registered" within the meaning of article 116 of the Limitation Act and that consequently the claim was not barred. The fact that the instrument was not signed by B did not take the case out of the operation of that article

Suit for money. Defendant had, in 1887, sued plaintiff on a promissory note. The case was remanded by the High Court to the District Court, whereupon the parties entered into a compromise, in pursuance of the terms of which plaintiff executed a mortgage deed in favour of defendant, in settlement of the claim. This mortgage bore date the 6th of May 1891, and, after reciting the fact that the present defendant had filed the suit against the present plaintiff, and that an appeal had been preferred, witnessed that the present plaintiff had agreed to pay a specified sum and had mortgaged certain property as security for its payment. The deed concluded thus:—"These mortgaged properties shall remain in my possession alone. I bind myself to discharge the said debt by means of the mortgaged property detailed above by means of my other property and by myself personally. Inasmuch as a second appeal has been preferred by you in the High Court at Madras in No. 1447 of 1889, in connection with the said suit, a petition shall be presented to stop enquiry regarding my share of the debt. This mortgage deed has been executed with consent. (Mark of) Ganne Kotayya."

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The deed was duly executed by plaintiff and registered. Plaintiff took no steps to stop the suit, and defendant also permitted it to proceed, in spite of the compromise, and subsequently executed the decree, which was passed in his favour on 20th November 1891. Plaintiff now sued to recover the sum taken from him by defendant under the decree, contending that the latter had been fraudulently obtained, having regard to the compromise. Defendant pleaded, *inter alia*, that he had executed the decree as plaintiff had been in default in carrying out the terms of the compromise.

The plaint alleged that plaintiff and another were raiyats of defendant, and had executed a promissory note in defendant's favour in respect of a debt due to defendant from a third person; that defendant had brought a suit on the note, when the claim was dismissed for want of consideration; that defendant had then appealed to the District Court, when the decree of the lower Court was confirmed; that defendant had preferred a second appeal to the High Court, when the suit was thrice remanded to the District Court for a finding; that while the second appeal was pending in the High Court, a compromise had been effected, by the terms of which plaintiff was to execute a mortgage and defendant should hold plaintiff free from all further responsibility and file petitions to stay the appeal; that plaintiff had duly executed the mortgage deed, which was registered; that defendant had filed a petition in the District Court, and plaintiff knew no more of the matter till a subsequent date, when defendant, who, in fact, obtained a decree, executed it against plaintiff, and attached his property, whereupon plaintiff had to pay the amount originally due on the promissory note. Plaintiff charged that defendant had acted fraudulently in obtaining and executing the decree in spite of the mortgage deed given under the compromise. He claimed to recover the amount taken from him by defendant in the execution proceedings, and stated the cause of action to have arisen at the date when the money had been collected from him in execution of the decree, viz, 29th October 1893. The plaint was filed on 14th September 1896.

The District Munsif held that it was the duty of the defendant to have notified the compromise to the Court, after accepting this mortgage in satisfaction of his claim. He decreed in plaintiff's favour, but the Subordinate Judge reversed this decree on appeal. Plaintiff preferred this second appeal.

Mr. Joseph Satya Nadar and T. Natesa Ayyar, for appellant,
argued on the facts as stated above.

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V. Krishnasami Ayyar and K. Subrahmanya Sastri for respondent:—The plaint, as framed, is for the recovery of money collected under a decree fraudulently obtained and the cause of action is stated to arise on the date on which the money was collected. It cannot now be construed, in second appeal, to be a plaint brought for damages for breach of contract. In the Courts below, this contention was never even urged. The suit as framed will not lie for the recovery of money collected under a decree so long as the decree stands (*Shama Purnad Roy Chowdery v. Hurro Purshad Roy Chowdery*(1)). The principle that money recovered under legal process cannot be recovered back has been upheld in many decided cases (*Muriot v. Hampton*(2)). Until the decree is set aside in a properly-framed suit no suit will lie for the recovery of money collected under it. The cases of *Krishnasami Ayyangar v. Runga Ayyangar*(3); *Mallamma v. Venkappa*(4); and *Vera, aghara v. Subbanna*(5) relating to adjustments do not apply. If a suit be brought for recovery of damages for breach of contract, the contract being to represent to the Court the fact of an adjustment and to withdraw an appeal, the cause of action arises on the date of the decree which the contracting party has permitted the Court to pass in breach of his contract. The suit is therefore barred, as it was brought more than three years from the date of the decree, which is the real date of the breach. So, even if this suit is construed to be a suit for damages for breach of contract, it must be dismissed on the ground of limitation, as it has been brought more than three years from the date of the breach. [BHASHIAM AYYANGAR, J.:—The money was recovered twice over by you and it is sufficiently clear that the defendant understood the suit to be one for damages for breach of contract. As for limitation, there is an undertaking in the registered mortgage deed that you would represent to the Court the fact of the compromise made by you outside the Court and this brings the case under article 116.] This mortgage deed is not signed by defendant and cannot in law amount to a "contract in writing registered" within the meaning of article 116. The mortgagor signed it and he chose to recite the undertaking in the

(1) 10 M.I.A., 203

(2) 7 T.R., 269, 2 Smith's L.C., p. 409.

(3) I.L.R., 20 Mad., 369.

(4) I.L.R., 8 Mad., 227.

(5) I.L.R., 5 Mad., 397.

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deed to which he alone affixed his signature. If the undertaking were of such a nature as to be a term of the actual mortgage, defendant might have been charged with constructive notice of it. But it relates to a matter quite extraneous to the mortgage, and therefore express notice of it on defendant's part must be proved. There has been no such proof. [BHASHYAM AYYANGAR, J. :— You have accepted it and even filed a petition stating that the matter was adjusted out of Court, though the lower Court refused to act upon it.]

JUDGMENT.—The only right of action to which the plaintiff, on the allegations made in the plaint, could be entitled, is a right to recover damages for breach of contract. The plaint certainly does not set out in terms that cause of action for the plaintiff seeks to recover the money extracted from him under the decree of the High Court with interest thereon and does not ask for damages. But all the necessary allegations are made in the plaint. The contract and the breach of it are alleged and the written statement shows clearly that the defendant understood what the claim against him was. We think the plaint must be read as sufficiently disclosing a cause of action. It cannot possibly be said that the defendant has been prejudiced by the omission to ask specifically for damages.

Then it is said that the suit is barred by limitation because the breach was made more than three years before the suit was filed. The answer to this is that the undertaking of the defendant to withdraw his second appeal was embodied in the registered mortgage instrument which he accepted from the plaintiff. The fact that the instrument is not signed by the defendant does not take the case out of the operation of article 113 of the schedule to the Limitation Act. We, therefore, hold that the suit is not barred by limitation. It is unnecessary to consider whether any cause of action would have accrued on the mere passing of the decree without any money being exacted under it. The plaintiff is clearly not entitled to the whole amount of the claim. The damage suffered by him is the amount levied from him *minus* the amount due by him under the mortgage with interest up to the date of the tender of the money (*viz.*, the 5th September 1893) that tender having been refused.

We must reverse the decree of the Subordinate Judge and restore that of the District Munsif, modifying it by substituting

the sum of Rs. 1,092-3-3. The defendant must also be directed to give up the mortgage instrument to the plaintiff.

The respondent must pay the costs here and in the Court below on the sum allowed.

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APPELLATE CIVIL.

*Before Sir Arnold White, Chief Justice, and Mr. Justice
Bhashyam Ayyangar.*

SESHACHALA NAICKAR (DEFENDANT), APPELLANT,

v.

VARADA CHARIAR (PLAINTIFF), RESPONDENT.*

1901.
April 19, 23.

Limitation Act—Act XV of 1877, sched. II, art. 116—Receipt for money, containing terms of sale, signed by vendor and not by purchaser—“Contract in writing registered.”

The mere recital, in a sale-deed, that the consideration has been paid is not a “contract in writing” to pay the consideration, within the meaning of article 116 of the second schedule to the Limitation Act; and where a sale-deed contains the contract of sale which has preceded the actual sale, article 116 may apply even though the sale-deed contains an acknowledgment that the consideration has been paid, when in fact it has not been paid.

Aruthala v. Dayamma, (I.L.R., 24 Mad., 233), followed.

Semble, that a document executed and given by a vendor of property to his purchaser, and registered, acknowledging payment of a sum of money on account of the purchase price, and providing that the balance should be paid within a certain date, is a “contract in writing registered,” within the meaning of article 116 of the second schedule of the Limitation Act, though it be not signed by the purchaser.

Kotappa v. Vallur Zamindar, (I.L.R., 25 Mad., 50), and *Ambalavana Pandaram v. Vaguran*, (I.L.R., 19 Mad., 52), approved.

SUIT for money. By a receipt, executed by plaintiff on 17th November 1893, (filed as exhibit IV), he acknowledged that defendant had that day paid him the sum of Rs. 50, as an advance on account of Rs. 10,000, the price agreed to be paid by defendant to plaintiff for the purchase of certain property. The receipt, which was signed only by plaintiff, concluded with the following clause:—“You (defendant) should within two months from this day pay the remaining sum of Rs. 9,950—after deducting these fifty

* Original Side Appeal No. 32 of 1900 against the decree of Mr. Justice Shephard in Civil Suit No. 113 of 1900.

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rupees and duly get a deed executed and registered, &c. . . .
If you fail to pay the whole amount within the two months, you should forfeit the abovementioned advance." This document was not registered.

On the same date defendant executed a document (filed as exhibit B), addressed to plaintiff, containing the following:—"As you have sold to me for Rs 10,000 and executed and given a sale of the properties . . . , I shall, as I have arranged with you to pay off the whole of the amount thereof, as soon as I go to Hyderabad and return, pay you the same as soon as I go and return."

The balance of purchase money was not paid on the date fixed for its payment in exhibit IV, namely, 17th January 1894. On 19th May 1894 plaintiff executed and gave to defendant a deed of sale of the property. This document, (which was registered and filed as exhibit A), recited the fact that the property had been sold to defendant absolutely for Rs 10,000, and that Rs 50 had been received as an advance on 17th November 1893 (the date of exhibit IV). It concluded as follows:—"As I have received from you on this date the remaining rupees nine thousand nine hundred and fifty, and delivered the aforesaid properties in your possession, you yourself shall from this date take possession of the aforesaid properties, and use and enjoy the same from son to grandson and so on in succession, with power to give away in gift, mortgage and sell, etc. To this effect is the sale-deed of land, house and ground, etc, written and given with my free will and consent."

The balance of purchase money had not in fact been paid on the date of exhibit A, though the document contained an acknowledgment thereof. Plaintiff alleged that sums amounting only to Rs. 2,655 had been paid since and that a balance of Rs. 7,345 was still due. Defendant contended that the whole of the purchase money had been paid three days after the sale-deed, and that the payments admitted by plaintiff related to another transaction. He pleaded that the claim was barred by limitation. The plaint was filed on 16th July 1900, and plaintiff relied on a payment alleged to have been made on account, on 9th September 1897, as giving a fresh starting point for limitation. Defendant denied having made this payment, but the Court found that it had been made and that all the part-payments, including this one, had been paid towards the purchase price. A decree for the amount sued for was passed in plaintiff's favour.

Defendant preferred this appeal, on the ground that the claim was barred by limitation

Sivasami Ayyar for appellant.

R. Kuppusami Ayyar and *Kumarasami Sastri* for respondent

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JUDGMENT — This is an appeal by the defendant against the decree of Mr Justice Shephard directing the defendant to pay, with future interest to the plaintiff, the sum of Rs. 7,345 being the amount claimed in the plaint as the balance of the amount of consideration for a sale-deed, dated 19th May 1894, executed by the plaintiff in favour of defendant.

The only ground on which this appeal is preferred is that the suit is barred by limitation.

The consideration for the sale of the house and other properties comprised in the sale-deed was Rs. 10,000 and the plaint set forth that part-payments amounting to Rs. 2,655 were, subsequent to the execution of the sale-deed and delivery of the property, made by the defendant from time to time, the last of such part-payments having been made on 9th September 1897.

The suit was brought for the recovery of the balance, viz., Rs. 7,345, and it is stated in paragraph 5 of the plaint that the cause of action arose on 9th September 1897, the date of such last part-payment and on 19th May 1894, the date of the sale-deed. The alleged part-payment of 9th September 1897 can furnish a fresh starting point for limitation under section 20 of Act XV of 1877 only on the supposition that the fact of such payment appears in the handwriting of the person making the same. The plaint therefore must be taken as alleging by necessary implication that the fact of such part-payment appears in the handwriting of the defendant or his agent. The defendant, while admitting all the part-payments except the last, pleaded that they were not made towards the consideration of the sale-deed but for a separate and independent transaction. The learned Judge who tried the suit held that all the part-payments, including the last part-payment, were made towards the consideration of the sale-deed; and this finding is not impugned before us.

The plea of limitation was set up in the written statement and an issue was also taken. In the course of the trial of the suit the plea of limitation was abandoned by the defendant's pleader when it was discovered that the plaint was really presented on 16th July 1900, the day on which the Court re-opened after the long vacation.

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which commenced on 7th May 1900 and not on the 27th July as was erroneously assumed. The learned Judge gave a decree in favour of the plaintiff on the merits.

It is now urged on behalf of the appellant that the article of the Limitation Act applicable to the suit is article 115 of the second schedule, which prescribes a period of three years, and not article 116 or article 120, under either of which the period is six years. It is conceded that, if the period of limitation applicable be six years, the suit is not barred by limitation in any view and that the plaintiff need not rely upon the part-payment of 9th September 1897 or any other part-payment. On the other hand, if the period of limitation applicable be three years, the suit will be barred by limitation, but for the part-payments within three years before the date of suit and part-payments within three years after 19th May 1894, which payments are all set forth in exhibit D.

The appellant's pleader contends that the contract to pay the purchase money is not "in writing registered" within the meaning of article 116, but that the defendant's obligation, if any, to pay the purchase money arises from a contract "not in writing registered" and that therefore article 115 governs the suit.

His contention eventually was that there was an oral contract implied by law collateral to the sale-deed after the same was executed by the plaintiff and accepted by the defendant. He evidently overlooked exhibit IV in the case which was not brought to our notice during the argument of the appeal. If that exhibit had been brought to notice the argument would have been considerably simplified. That is a receipt, dated 17th November 1893, given by the plaintiff to the defendant acknowledging payment in advance of Rs 50 in part-payment of the price of Rs 10,000. It contains the terms of the contract of sale, fixing a period of two months from 17th November 1893 for payment of the balance of purchase money, viz, Rs. 9,950, and the execution of a conveyance. It also provides that in default of payment of the balance of the purchase money within the stipulated time, the defendant should forfeit the Rs. 50 paid by him in advance.

The balance of purchase money was not paid on or before 17th January 1894, the time fixed in exhibit IV; but the conveyance exhibit A was nevertheless executed on 19th May 1894. It recites the payment of Rs. 50 in advance on 17th November 1893 and

acknowledges the receipt of the balance of purchase money as paid on the date of the sale-deed. It is therefore clear that the plaintiff, the vendor, waived the stipulation as to time and completed the sale on 19th May 1894 and delivered to the defendant possession of the properties sold. In a recent decision of the Privy Council, *Sah Lal Chand v. Indarjit*(1), it is laid down as the settled law that notwithstanding an admission in a sale-deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid. Under the contract of sale which was entered into in November 1893, the terms of which were reduced to writing in exhibit IV, the defendant agreed to pay the purchase money on or before 17th January 1894, and in the sale-deed the same is acknowledged to have been paid to the plaintiff on the 19th May 1894 when the conveyance was executed, though, in fact, it was not so paid. The present suit therefore is based, not on any contract implied by law on the execution of the sale-deed, but upon the express contract of sale of 17th November 1893, claiming compensation for breach of the contract to pay the purchase money on obtaining the conveyance. Exhibit IV is not registered and the question of limitation therefore is governed by article 115. If the receipt had been registered, we should have been prepared to hold, following the decision of this Court in *Ambalavana Pandaram v. Vaguran*(2), and the recent decision of this Court in *Kotappa v. Vallur Zamindar*(3), that article 116 would be applicable to the case notwithstanding that exhibit IV was not signed by the defendant. In *Avuthala v. Dayumma*(4) which was cited by the learned pleader for the appellant, it was not only held that a suit to enforce the vendor's lien was governed by article 111 and not by article 132, but that, as regards the personal remedy, the benefit of the six years given by article 116 was inapplicable, though the sale-deed which simply recited that the price had been paid was registered. In that decision we concur, for the mere recital in the sale-deed that the consideration had been paid cannot be construed as a contract in writing to pay the consideration money. If the oral agreement or contract of sale which immediately preceded the actual sale be also reduced to writing, as is very often the case, in the deed of sale itself which is registered, the case might be different and article 116 would govern it though

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(1) L.R., 27 I.A., 93; I.L.R., 22 All., 370. (2) I.L.R., 19 Mad., 52.
(3) I.L.R., 25 Mad., 50. (4) I.L.R., 24 Mad., 233.

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the sale deed also acknowledges the payment and receipt of the price when in fact it was not paid, but its receipt was acknowledged in anticipation of payment being made. In the present case, not only is the preliminary contract of sale not reduced to writing in the sale-deed, but it had already been reduced to writing in exhibit IV, which was not registered. According to the terms of the contract of sale the cause of action for enforcing the payment of purchase money by specific performance against the vendee arose on the 17th of January 1894. The time limited for the specific performance having been waived by the plaintiff and the conveyance having been executed on the 19th of May 1894, time for payment of the purchase money was really extended till that date, and the price became payable on that day and the cause of action for the recovery of the purchase money accrued on that day. Even assuming that the limitation commenced on the 17th of January 1894, it will make no difference in the case, inasmuch as on the 19th of May 1894 there was an acknowledgment of liability in writing by the defendant in exhibit B within the meaning of section 19 of the Limitation Act and there were several part-payments subsequent thereto up to the 19th of July 1896 and there was a further part payment on the 9th of September 1897. The suit having been brought on the 16th of July 1900, it was within three years from the dates of the last two part-payments and would therefore not be barred under article 115 of the Limitation Act, if, as found by the learned Judge, the part-payments have been made, and if, as averred in law, in the plaint, the fact of part-payments or at any rate of the last two part-payments appears in the handwriting of the defendant or his agent. The defendant having abandoned the plea of limitation during the course of the trial of the suit and, as we are told by the respondent's pleader, who also appeared at the original trial, before the plaintiff's case was closed, we cannot allow the appellant to revive, in appeal, the plea of limitation which he had deliberately abandoned in the Original Court, when, as in this case, such plea cannot be decided by the Appellate Court either upon facts as found by the learned Judge or as admitted by the defendant; and it would be necessary to remit the issue of limitation to the learned Judge for further trial if the plea of limitation were now allowed to be raised.

The appeal therefore fails and it is dismissed with costs.

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PRIVY COUNCIL.

SUBRAHMANIA AYYAR (APPELLANT),

v.

KING-EMPEROR (RESPONDENT).

P.C.*
1901.
June 26, 28.
August 2

[On appeal from the High Court of Judicature
at Madras.]

Criminal Procedure Code—Act V of 1898, ss. 233, 234, 235 (1)—Misjoinder of charges—Trial by jury on indictment in which charges have been wrongly joined—Irregularity in criminal proceedings—Count charging continued acts of abetment of extortion and bribery—Penal Code—Act XLV of 1860, ss. 109, 161 and 384—Evidence Act—Act I of 1872, s. 167.

The appellant was tried at the Criminal Sessions of the High Court, and convicted, on an indictment the first count of which contravened the provisions of sections 233 and 234 of the Code of Criminal Procedure (which provide that every separate offence shall be charged and tried separately, except that three offences of the same kind may be tried together in one charge if committed within the period of one year), and did not fall within the provisions of section 235 (1) (which provides that if, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence). (On a case certified under article 26 of the Letters Patent and heard by the Full Court, it was held by the majority of the Court that the union of the first count with the others made the whole indictment bad for misjoinder, but that it was open to them to strike out the first count, rejecting the evidence with regard to it, and deal with the evidence as to the remaining counts of the indictment. This was done with the result that the conviction was upheld on one count only, the sentence being reduced :

Held, by the Judicial Committee that the disregard of an express provision of law as to the mode of trial was not a mere irregularity such as could be remedied by section 537 of the Criminal Procedure Code. Such a phrase as "irregularity" is not appropriate to the illegality of trying an accused person for more different offences at the same time, and those offences being spread over a longer period than by law could have been joined together in one indictment.

Smurthwaite v. Hannay, ([1894] A.C., 494), referred to. *In the matter of Abdur Rahman*, ((1900) I.L.R., 27 Cal., 839), dissented from.

Nor could such illegal procedure be amended by arranging afterwards what might or might not have been properly submitted to the jury. To allow this would leave to the Court the functions of the jury, and the accused would never have been really tried at all upon the charge afterwards arranged by the Court.

* *Present* : Lords CHANCELLOR (HALSBURY), MACNAGHTEN, DAVEY, ROBERTSON, and LINDLEY.

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The trial having been conducted in a manner prohibited by law was held to be altogether illegal and the conviction was set aside.

APPEAL from a decision of the High Court under article 26 of the Letters Patent of 1865, which modified the verdict of a jury in a case tried in the 'Original Criminal Jurisdiction of the Court,' and the sentence pronounced in pursuance of such verdict, and sentenced the appellant to two years' rigorous imprisonment and a fine of Rs. 5,000, and in default of payment of the fine to a further term of nine months' imprisonment.

The appellant, Subrahmania Ayyar, was superintendent of the military accounts department, Madras. One J. L. P. D'Santos was supervisor of the same department subordinate to the appellant.

On 8th November 1899 the Chief Presidency Magistrate of Madras framed ten charges against the appellant and D'Santos for offences under sections 109, 161 and 384 of the Penal Code, and committed them for trial on the said charges to the High Court of Madras. The case came on for hearing at the First Criminal Sessions for the Town of Madras for 1900, when the appellant and D'Santos were jointly charged under the above sections upon an indictment which contained seven counts.

The first count stated as follows:—

"That they, the said Subrahmania Ayyar and the said J. L. P. D'Santos, being public servants to wit, respectively, deputy examiner, superintendent and supervisor of the accounts branch of the military accounts department in or about the month of March 1896 did conspire and combine together and thereafter until the month of November 1898 did continue so to conspire and combine, for the purpose of extorting money and obtaining illegal gratifications from clerks in the accounts branch of the military accounts department for himself, the said Subrahmania Ayyar, in pursuance of and according to which said conspiracy and combination the said Subrahmania Ayyar did obtain for himself through the said J. L. P. D'Santos divers sums of money, to wit, from one Kalyana Chetti during the years 1896-97 and 1898 sums amounting in the aggregate to Rs. 680; from one Balasundara Mudali the sum of Rs. 100 on or about August 27th, 1896, the sum of Rs. 50 on or about March 1st, 1897, and the sum of Rs. 100 on or about May 10th, 1897; from one Srinivasa Chari the sum of Rs. 100 on or about October 2nd, 1898; and from one Vedachala Chetti the sum of Rs. 5 in August 1898, the sum of Rs. 5 in September 1898, the sum of Rs. 3 in October 1898, and the

sum of Rs. 3 in November 1898, and that they have thereby committed an offence punishable under sections 109 and 384 and sections 109 and 161 of the Penal Code, and within the cognizance of the High Court of Judicature at Madras aforesaid.”

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The second, fourth and sixth counts charged the appellant with having on or about 27th August 1896, the 1st March 1897 and 10th May 1897, respectively, dishonestly induced one Balasundara Mudali to pay to himself through the said J. L. P. D'Santos the sums of Rs. 100, Rs. 50 and Rs. 100, the first and second of such acts being charged as an offence punishable under sections 161 or 384 of the Penal Code, while the third was charged as an offence under sections 109 and 161.

The third, fifth and seventh counts charged D'Santos with having abetted the appellant in the commission of the offences set out in the second, fourth and sixth counts, respectively, and as being thereby punishable under sections 109 and 161 or 384.

The case certified under article 26 of the Letters Patent by the officiating Advocate-General after setting out the counts of the indictment stated so far as it is material for this report as follows :—

“ 2 That the said Subrahmania Ayyar pleaded not guilty to the first, second, fourth and sixth counts of the charges framed against him, and was tried by the Hon'ble Mr Justice Boddam and a special jury between the 14th February and 12th March 1900 when the said Subrahmania Ayyar was convicted on the first, second and sixth counts of the charges framed against him, and acquitted under the advice of the said learned Judge on the fourth count, and the said learned Judge thereupon sentenced him to three years' rigorous imprisonment and a fine of Rs. 8,000.

“ 3. That before the jury were empanelled Mr. Daly, who appeared as Counsel for the Crown, moved before the learned Judge that pardon should be tendered to D'Santos and that he should be examined as a witness for the Crown.

“ 4. That the learned Judge thereupon directed that the pleas of the accused D'Santos on the various counts of the charges framed against him, namely, the first, third, fifth and seventh counts, should be first recorded, before pardon was tendered

“ 5. That the said D'Santos pleaded guilty to each of the said counts under the advice of Mr Daly, Counsel for the Crown.

“ 6. That the said learned Judge then proceeded to tender pardon to the said D'Santos under section 338 of the Criminal Procedure

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Code, when it was objected by Counsel for Subrahmania Ayyar that the tender of pardon would be *ultra vires*, firstly, because the offences in question were not exclusively triable by the High Court, and secondly, because pardon could not be tendered to the said D'Santos as he had already pleaded guilty.

"7. That the said learned Judge overruled the objection taken by Counsel for Subrahmania Ayyar and tendered pardon to the said D'Santos under section 338 of the Code of Criminal Procedure, and the said D'Santos was examined as a witness for the Crown on 26th and 27th February 1900 and his evidence was placed by the learned Judge before the jury along with the other evidence in the case.

"8. That when the indictment was read out and before plea objection was taken by Counsel for Subrahmania Ayyar to his trial on the first count on the ground, firstly, that the said count which charged both the accused with one offence of conspiracy, disclosed no offence under the Penal Code; secondly, that even if it did, it could not be tried at one trial under sections 233 and 234 of the Code of Criminal Procedure along with the second, fourth, and sixth counts; and thirdly, that assuming the said count should be construed as charging the said Subrahmania Ayyar with various and distinct offences in respect of several matters of alleged extortions of money and illegal gratifications, exceeding three in number, therein specified as having occurred between March 1896 and November 1898, three of which form respectively the subject matter of the second, fourth, and sixth counts against the said Subrahmania Ayyar, it could not, under the provisions of sections 233 and 234 of the Code of Criminal Procedure be tried at one trial, and that such a trial would prejudice the said Subrahmania Ayyar in the view of the jury, and embarrass him in his defence; that the said objections were overruled by the learned Judge and the indictments were allowed to stand and the evidence allowed to be adduced on behalf of the Crown in respect of the first count which evidence was not relevant to the second, fourth, and sixth counts."

The material clauses of the certificate given by the officiating Advocate-General were—

"(a) That in my judgment the learned Judge who presided at the First Criminal Sessions of the High Court of Judicature at Madras for 1900 erred in law in deciding that it was competent to him to tender a pardon to D'Santos notwithstanding that none of the offences in respect of which the said Subrahmania Ayyar was being tried was, within the meaning of the Criminal Procedure Code, exclusively triable by the High Court, and that therefore the learned Judge

erred in law in admitting the evidence given by D'Santos as a witness for the Crown after pardon had been tendered to him and in placing the same before the jury.

"(b) That in my judgment the said learned Judge erred in law in not striking out the first count from the indictment but trying and convicting the said Subrahmanya Ayyar on it and in allowing evidence to be adduced by the Crown in respect of the first count as regards matters of alleged extortions of money and illegal gratifications therein specified other than those forming the subject matter of the second, fourth, and sixth counts and placing the same before the jury.

"(c) That in my judgment the said learned Judge erred in law in trying the said Subrahmanya Ayyar on the first, second, fourth, and sixth counts at one trial."

Upon this certificate the case was heard twice before the Full Court of six Judges (SIR ARNOLD WHITE, C.J., and SHEPARD, DAVIES, BENSON, BODDAM, and MOORE, JJ.). It was heard first upon the questions of law, and afterwards upon the facts.

On the questions of law all the Judges held that the offer of a pardon to D'Santos was illegal, but all with the exception of DAVIES, J., held that his evidence was still admissible.

As to the first count, while the CHIEF JUSTICE, and SHEPARD and BODDAM, JJ., held that it was good, BENSON, DAVIES and MOORE, JJ., held that it was bad. All the Judges except BODDAM, J., held that, whether it was good or bad, its union with the remaining counts made the whole indictment bad for misjoinder. But all the Judges except DAVIES, J., who gave a qualified opinion, thought that it was open to them to strike out the first count and deal with the evidence applicable to the remaining counts.

On the final hearing upon the facts, all the Judges were of opinion that the appellant should be acquitted on the second count. They also agreed in thinking that D'Santos was utterly untruthful and that no reliance whatever could be placed upon his evidence. As to the sixth count, which alone remained, all the Judges, except DAVIES, J., were of opinion that after excluding the evidence of D'Santos and disbelieving, as they did, the evidence of Sivachandra, there was enough left to support the conviction of the appellant on the sixth count. DAVIES, J., thought that the charge being laid as one of bribery, the evidence of Balasundara was the evidence of an accomplice which, according to the invariable practice of the Courts in India, required corroboration. As to Sivachandra he said "Now,

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whether this story be true or false it is no corroboration of Balasundara's story and brings nothing home to the first accused. I therefore find that there is no legal evidence upon which the sixth count can be supported. Supposing again that I am wrong in appreciating the evidence, surely it was a case in which the jury might have doubt . . . and might have given the accused the benefit of the doubt." Then he relied on the judgment of the Lord Chancellor in *Makin v. Attorney-General for New South Wales*(1) as showing that, where the accused was entitled to the finding of a jury, it was not open to the Court, upon different evidence from that which had been before the jury, to pronounce that he was guilty.

The result was that in modification of the original sentence the Court sentenced the appellant to a term of two years' rigorous imprisonment and a fine of Rs. 5,000, and in default of payment of the fine to a further term of nine months' imprisonment.

The following are the material portions of the judgments of the Court on the questions of law :—

SIR ARNOLD WHITE, C.J —The first point of law which is raised in the certificate of the officiating Advocate-General is with reference to the pardon tendered to the second accused The question of the legality of the pardon turns entirely upon the construction of sections 337 and 338 of the Code of Criminal Procedure. On principle it is difficult to see why the discretionary power of the Judge of a Sessions Court or of a Judge of the High Court to tender a conditional pardon should, when a case has been committed to a Sessions Court or to the High Court, be limited to cases which were, in the first instance, "exclusively triable by the Court of Session or High Court." However, the effect of the words "such offence" in section 338 is to restrict the scope of the section to the offences referred to in section 337, namely, offences triable exclusively by the Court of Session or High Court. The offences in the present case were not triable exclusively by a Court of Session or the High Court. It has been expressly decided by the Calcutta High Court that a Sessions Judge cannot tender a pardon to an accused under section 338 of the Code of Criminal Procedure when the offence for which he has been committed is not triable exclusively by the Court of Session—*Queen-Empress v. Sadhee Kasal*(2). On the construction of sections 337 and 338 I am constrained to hold that it was beyond

(1) (1893) [1894] A.C., 57

(2) (1884) I.L.R., 10 Cal., 936.

the powers of the learned Judge to tender a conditional pardon, and that the learned Judge erred in law in deciding that it was competent to him to tender a pardon to the second accused.

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With reference to the question of the legality of the pardon the certificate of the officiating Advocate-General proceeds to state that "therefore" (*i.e.*, by reason of the fact that it was not competent for the learned Judge to tender a pardon to the second accused), in the judgment of the officiating Advocate-General "the learned Judge erred in law in admitting the evidence given by the second accused as a witness for the Crown and in placing the same before the jury." In my view the question of the admissibility of the evidence of the second accused as a witness for the Crown must be considered independently of the question of the legality of the pardon. The course of events at the trial was this. On behalf of the Crown an application was made that a conditional pardon might be tendered to the second accused. The learned Judge declined to consider the application until the second accused had pleaded to the charges preferred against him. The second accused then pleaded guilty on the first, third, fifth and seventh counts of the indictment and his plea was recorded. The learned Judge then tendered a pardon to the second accused under section 338 of the Code of Criminal Procedure following the words of section 337, and the second accused was then removed from the dock. This is the statement of the learned Judge as to what took place at the trial and his statement is conclusive. If the learned Judge had made it a condition of pardon that the second accused should plead guilty, other questions would no doubt have arisen for consideration. The learned Judge however made no such condition, and the real question therefore which we have to consider is whether, apart from the question of pardon, the second accused, in the events which happened, became a competent witness for the Crown. This question is not raised in the certificate of the officiating Advocate-General, but inasmuch as it has been fully argued on both sides, and inasmuch as it is impossible for this Court to "review the case" as we are empowered to do by article 26 of the Letters Patent without determining this point, I proceed to deal with it.

The English practice, when an accomplice is to be called for the Crown, is either (i) not to include him in the indictment, (ii) to take his plea of guilty or otherwise withdraw his case from the jury before calling him, (iii) to offer no evidence against him on the indictment and take an acquittal before calling him, or (iv) to enter a *nolle prosequi*. In the case of *Winsor v. The Queen*(1) it was held by the

(1) (1866) L.R., 1 Q.B., 390.

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Exchequer Chamber on a writ of error from the Court of Queen's Bench that when two prisoners were jointly indicted and pleaded "not guilty," but only one was given in charge to the jury, the other was an admissible witness although his plea of "not guilty" remained on the record undisposed of. Unless precluded from so doing by any express provision of the law of India, I should be prepared to apply the principle of this decision to the facts of the present case and to hold that, when the second accused had pleaded guilty, as between him and the Crown, no issue remained to be tried, and that his incompetency to give evidence was removed, notwithstanding that, at the time he gave his evidence, his plea of guilty remained on the record undisposed of.

In support of the view that the evidence of the second accused was inadmissible, it has been argued that the plea of guilty, in itself, did not amount to a conviction; that at the time he gave his evidence the trial of the second accused was not at an end and that he then was an "accused person" and therefore incompetent to give evidence on oath. Our attention was drawn to a number of sections of the Code of Criminal Procedure (sections 243, 245, 246, 255, 257, 263 (g) and (h), 305, 306, 307, 309, 412 and 562), as showing that the Code of Criminal Procedure contemplates some further proceeding by the tribunal before which the admission of guilt is made or the plea of guilty is pleaded, before the admission or the plea becomes a "conviction." The word "conviction" with its cognate expressions would seem to be used somewhat loosely in the Procedure Code. For example in section 271 "convicted" seems to mean nothing more than "sentenced," since the Code contains no other provision for dealing with an accused person who pleads guilty. It may be that it would have been more strictly regular if the learned Judge, after recording the plea of guilty, had stated or recorded in set terms that he convicted the second accused on his plea of guilty. But, in my judgment, the question of the admissibility of the evidence of the second accused ought not to be decided on the narrow and technical ground that he had not been "convicted" in the sense in which the word is used in certain sections of the Code of Criminal Procedure, but on the broad ground that when he gave his evidence he was not in charge of the jury and no issue remained to be tried between him and the Crown.

The authorities relied upon by the defence are in no way in conflict with this view. In *Reg. v. Hannanta*(1) the Bombay High Court held

(1) (1877) I.L.R., 1 Bom., 610.

that the evidence given by a person who had received a pardon in the case of an offence not exclusively triable by the Court of Session was not relevant inasmuch as the witness had not been acquitted or discharged or convicted. So far as can be gathered from the report the witness would seem to have pleaded "not guilty." In any case the question of the effect of a plea of guilty was not raised or considered. The same observation applies to the judgments of the Allahabad High Court in *Empress of India v. Asghar Ali*(1) and *Queen-Empress v. Kallu*(2). The cases in which it has been held that, when one of two persons jointly charged pleads guilty, his confession is not admissible against the other, are illustrations of the proposition that, when an accused person has pleaded guilty, nothing remains to be tried as between him and the Crown. In *Queen-Empress v. Pahuja*(3) *A* and *B* were charged with murder. *A* pleaded guilty, but he was not convicted or sentenced till the conclusion of the trial of *B*. The Sessions Judge took into consideration as against *B* a confession made by *A*. The Court held that after *A* had pleaded guilty he could not be treated as being jointly tried with *B*, and his confession therefore was not admissible as against *B* under section 30 of the Indian Evidence Act. In *Reg v. Kalu Patil*(4) it was held by the Bombay High Court that a prisoner who pleads guilty at the trial and is convicted and sentenced cannot be said to be tried jointly with other prisoners committed on the same charge who plead not guilty: and in *Venkataram v. The Queen*(5) where the prisoner at the time he gave his evidence had pleaded guilty but had not been sentenced, a Judge of this Court decided the same point in the same way. A Divisional Bench of this Court has recently decided (see *Queen-Empress v. Chinna Pavuchi*(6)), that a trial does not necessarily come to an end with a plea of guilty. Using the word trial in its popular and not in its technical sense this is a proposition which is indisputable. In the present case the 'trial'—in the non-technical sense—of the second accused had obviously not come to an end when he gave his evidence seeing that after he had given his evidence he was sentenced on his plea of guilty. But the question is not whether his trial had come to an end, but whether his incompetency to give evidence had been removed. In my judgment when the second accused gave his evidence, he was not an incompetent witness, and an oath could be lawfully administered to him. I think his evidence against the first accused was rightly admitted.

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(1) (1879) I.L.R., 2 All., 260.

(3) (1894) I.L.R., 19 Bom., 195.

(5) (1883) I.L.R., 7 Mad., 102.

(2) (1884) I.L.R., 7 All., 160.

(4) (1874) 11 Bom. H.C.B., 146.

(6) (1899) I.L.R., 23 Mad., 151.

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The next question for consideration is whether the first count of the indictment is bad The count alleges that the two accused in the month of March 1896 conspired, and until November 1898 continued to conspire to extort money and obtain illegal gratifications from clerks for the first accused, and that, in pursuance of this conspiracy, the first accused obtained for himself through the second accused divers sums of money from four individuals. The count specifies the moneys thus alleged to have been obtained. For the purposes of the question now under consideration it is sufficient to say that the sums of money thus specified are more than three in number, and that the period during which, it is alleged, these sums of money were obtained exceeds one year. The count then charges both accused with having committed an offence under sections 109 and 384 and sections 109 and 161 of the Penal Code. Under the English Law the agreement or combination to do an unlawful thing or to do a lawful thing by unlawful means amounts in itself to a criminal offence. The only provision in the Indian Penal Code which makes the mere combining or conspiring without more, a criminal offence is contained in section 121-A, which provides:—"Whoever within or without British India conspires to commit any of the offences punishable by section 121, or to deprive the Queen of the sovereignty of British India or any part thereof, or conspires to overawe, by means of criminal force or the show of criminal force, the Government of India or any local Government, shall be punished with transportation for life or any shorter term or with imprisonment of either description which may extend to ten years. *Explanation*—To constitute a conspiracy under this section it is not necessary that any act or illegal omission shall take place in pursuance thereof." Section 107 of the Penal Code provides that a person abets the doing of a thing who "engages with another person in a conspiracy for the doing of that thing if an act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of that thing." Explanation 2 to section 108 provides that "to constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused." Section 107 does not create any offence. It merely specifies three ways in which the doing of a thing may be abetted. Under this section the offence of an abetment of an offence by instigation may be committed, although nothing is done as the result of the instigation, but it is a necessary ingredient of the offence of an offence by conspiracy that an act or illegal omission should take place in pursuance of the conspiracy. Thus, a charge of abetment of an offence by conspiracy which did not allege an act done in pursuance of the conspiracy would,

under the Indian law, be bad upon the face of it. Section 108 provides :—" A person abets an offence who abets either the commission of an offence, or the commission of an act which would be an offence if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor." Section 109 provides the punishment for the offence of abetting an offence. It is in these terms :—" Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence." This section does not say "if the offence is committed," but "if the act abetted is committed." This shows that in cases of abetment by conspiracy a punishable offence has been committed as soon as an act has been done in pursuance of the conspiracy. I do not think the words "act abetted" are used in section 109 as a synonym for "offence." No doubt there are sections of the Penal Code, in which the word "act" is used as meaning "offence." But in section 109 and in the illustration thereto a distinction seems to be drawn between an act abetted, and an offence committed. The first count charges a continuous abetment of an offence by conspiracy. The allegations as to things done or in the phraseology of the English Law "overt acts" are not allegations of separate offences, and are not charged as such; they are allegations of things done in pursuance of the conspiracy which may or may not amount to offences in themselves. These acts are charged in order that the jury may draw the inference, if, in their opinion, the evidence supports such inference, that the offence of abetment of extortion or abetment of bribery by conspiracy has been committed. In my opinion the first count only alleges one offence—that of the abetment of an offence by conspiracy. In my opinion, apart from the question as to whether changes in the substantive law could be effected by the provisions of a Code of Procedure, it was not the intention of the Legislature, by the introduction into the Procedure Code in 1872 of the section which corresponds with section 233 of the present Code, to alter or modify, either as to form or substance, the law of abetment by conspiracy as laid down in the Penal Code. Further, the proposition that, in laying a charge of conspiracy by abetment, the number of overt acts, which can be alleged, is restricted to three by reason of sections 233 and 234 of the Code of Criminal Procedure is inconsistent with the express provisions of section 10 of the Evidence Act, 1872. It has been objected that the first count contains charges of abetment by conspiracy of two offences—bribery and extortion. Having regard to the provisions of sections 235 (2) and 236 of the Code of Criminal Procedure, this

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The next point of law which has to be considered is the question of the legality of the trial of the first accused on the first, second, fourth and sixth counts at one trial. As to this the officiating Advocate-General certifies that, in his judgment, the learned Judge erred in law in trying the first accused on the first, second, fourth and sixth counts at one trial. In my opinion the indictment, as a whole, is bad for misjoinder, and the learned Judge erred in law in trying the first accused on the first, second, fourth and sixth counts at one trial. The first count charges as against the first accused, the offence of abetment of bribery, or of extortion, by conspiracy. This is a distinct offence. The second count charges against him a specific act of bribery or extortion committed on 27th August 1896. This is a distinct offence. The fourth count charges against him a specific act of bribery or extortion committed on 1st March 1897. This is a distinct offence. The sixth count charges against him a specific charge of bribery committed on 10th May 1897. (It was admitted by the junior Counsel for the Crown that it was intended by this count to charge the substantive offence, and not the abetment of an offence. The reference to section 109 must be taken to be a clerical error. Otherwise the count is meaningless.) The offence charged in the sixth count is a distinct offence. We have thus an indictment in which the accused is charged with more than three distinct offences in contravention of sections 233 and 234 of the Code of Criminal Procedure. The question then is—can the indictment as a whole, be supported on the ground that it charges offences committed in one series of acts so connected as to form the same transaction within the meaning of section 235 of the Code of Criminal Procedure? I think the answer to this question must be in the negative. If the series of acts alleged in the second, fourth and sixth counts of the indictment are not themselves so connected as to form one transaction, it is obvious that the offence of abetment by conspiracy cannot be said to have been committed “in one series of acts so connected together as to form the same transaction.” In my judgment neither the words of the section nor the illustrations thereto would justify the construction of the words “the same transaction” as applicable to the acts alleged in the second, fourth and sixth counts of the indictment in the present case. This view, moreover, is strongly supported by authority. I need only refer to the cases of *Queen-Empress v. Fakirapa*(1), *In the*

(1) (1890) I.L.R., 15 Bom., 491.

matter of Luchminarain(1), and *Queen-Empress v. Chandi Singh*(2). SUBRAHMANIA
 Section 222 (2) of the Code of Criminal Procedure is an express AIYAR
 provision that, when the accused is charged with criminal breach of v.
 trust, or dishonest misappropriation of money, it shall be sufficient to KING-
 specify the gross sum in respect of which the offence is alleged to have EMPEROR.
 been committed, and the dates between which the offence is alleged to
 have been committed without specifying particular items or exact
 dates, and the charge as framed shall be deemed to be a charge of an
 offence within the meaning of section 234. An express enactment was
 thus considered necessary in the case of a series of acts of dishonest
 appropriation of money, or of criminal breach of trust, to bring the
 case within the scope of section 234. In the absence of any express
 enactment applicable to the facts of the present case it seems to
 me that the contention that the acts alleged in the second, fourth,
 and sixth counts form the same transaction cannot be supported.
 Moreover, the proviso to section 222(2) shows the intention of the
 Legislature that no further departure from the law as laid down in
 sections 233, 234, and 235 should be made than was necessary for the
 purposes of that particular enactment. * * * *

At the conclusion of the argument on the points of law raised in the
 officiating Advocate-General's certificate, it was intimated to Counsel
 that the majority of the Court being of opinion that the first count
 ought to have been struck out of the indictment, the Court would
 review the case against the first accused on the evidence on the record
 relating to the charges preferred against him in the second and sixth
 counts of the indictment, the first accused having been acquitted on
 the fourth count. An objection was then raised by Mr. Norton on
 behalf of the defence, that in view of the opinion of the majority of
 the Court that the first count ought to have been struck out of the
 indictment, it was not competent to this Court to review the case on
 the evidence or any portion of the evidence, and that inasmuch as as
 the defence contended) article 26 of the Letters Patent gave no power
 to order a new trial, the first accused was entitled, on the findings of
 the Court upon the points of law, to be acquitted or discharged. It
 was argued that section 233 of the Code of Criminal Procedure is in
 its terms imperative; that a trial which had been conducted in con-
 travention of the provisions of the section was an illegal trial; that
 inasmuch as the jurisdiction of this Court was based upon article 26
 of the Letters Patent, the Crown could not pray in aid the provision
 of section 537 of the Code; and that, even if they could, section 537
 applied only to proceedings in which an irregularity had been

(1) (1886) I.L.R., 14 Calc., 128.

(2) (1887) I.L.R., 14 Calc., 395.

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committed, and not to a trial which was illegal *ab initio*. In support of this contention the defence relied upon the decisions in the cases (amongst others) of *Queen-Empress v. Chandi Singh*(1), *In the matter of Luchmanaram*(2), *Queen-Empress v. Fakirapa*(3), *Pulsanki v. The Queen*(4), and on a passage in the judgment of the Calcutta High Court in the case of *Niratan Sen v. Jogesh Chundra Bhattacharjee*(5). The short answer to this contention appears to me to be that the question is not whether any irregularity or illegality in the trial is curable, but whether under the powers conferred by article 26 of the Letters Patent this Court has power to review the case notwithstanding the irregularity or illegality. The condition precedent to the exercise of the powers conferred by article 26 of the Letters Patent, the granting of a certificate by the Advocate-General that in his judgment there has been an error in the decision of a point of law, or that a point of law should be further considered, has been fulfilled. This is the only condition precedent prescribed by the article to the exercise of the powers conferred by the article. Section 233 is a provision in a Code of Procedure, and, in my judgment, a contravention of the provisions of this section does not render a trial "illegal," so as to preclude this Court from exercising the jurisdiction conferred upon it by article 26 of the Letters Patent, if the conditions precedent prescribed by the article to the exercise of that jurisdiction have been fulfilled.

It was also argued that it was not competent for this Court to review the evidence inasmuch as, by so doing, we should be usurping the functions of a jury, and substituting the judgment of the Court for the verdict of a jury. This was the view taken by Mr. Justice Bayley in the judgment delivered by him in the case of *Reg. v. Navroji Dadabhai*(6). The majority of the Court, however, were of opinion that they had jurisdiction to review the evidence and pass such judgment thereon as they thought fit. In *Queen v. Hurribole Chunder Ghose*(7) Sir Richard Garth in the course of his judgment said (page 218):—"Apart, however, from section 167 of the Evidence Act, I think that, under article 26 of the Letters Patent by virtue of which this case has been submitted to us for review, we have a right either to quash or confirm the conviction, as we may think proper. The section enables the Court, after deciding upon the point reserved or certified, to pass such judgment or sentence as it may think right. If, therefore, upon reviewing the whole case, we are of opinion that,

(1) (1887) I L R., 14 Calc., 395

(3) (1890) I L R., 15 Bom., 491.

(5) (1896) I.L.R., 23 Calc., 983 at p 990.

(7) (1876) I.L.R., 1 Calc., 207 at p 218.

(2) (1886) I L R., 14 Calc., 123.

(4) (1882) I L R., 5 Mad., 20.

(6) (1872) 9 Bom. H.C.R., 358.

upon the evidence properly received, there is sufficient ground to convict the prisoner, I consider that we ought to allow the conviction to stand."

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In *Imperatrix v. Pitamber Jina*(1) the Bombay High Court took the same view. In *Queen-Empress v. O'Hara*(2) a Full Bench of the Calcutta High Court, after hearing argument upon the point, held that it was competent for them in dealing with a case under the Letters Patent to review the case upon the evidence, notwithstanding that at the trial there had been improper reception of evidence and misdirection by the learned Judge who tried the case. Thus in Bombay and Calcutta it appears to be now settled law that it is competent for a Court dealing with a case under the Letters Patent, to review the case on the evidence properly admissible at the trial. The defence has been unable to call our attention to any decision or dictum, where the question before the Court has been the powers of the Court under the Letters Patent which is in conflict with the established practice in Calcutta and Bombay, excepting the judgment of Mr. Justice Bayley in *Reg. v. Navroji Dadabhai*(3). With regard to Mr. Justice Bayley's judgment it is to be observed that for the purposes of his judgment he appears to have assumed that section 167 of the Evidence Act did not apply to criminal cases. It is now well settled, as was conceded by the defence, that section 167 applies to criminal as well as to civil proceedings. The argument for the defence, so far as the question of the improper admission of evidence is concerned, is inconsistent with the express words of section 167. The defence, however, contended that the decisions to which I have referred above ought not to be followed, having regard to the judgment of the Court for the consideration of Crown Cases Reserved in *The Queen v. Gibson*(4) and that of the Judicial Committee in *Makin v. Attorney-General for New South Wales*(5). The former case was decided before the decision of the Calcutta High Court in *The Queen-Empress v. O'Hara*(2). The latter was after that decision. As regards the latter case the question turned on the construction of a section of the New South Wales Criminal Law Amendment Act, 1883, which is taken almost word for word from section 2 of the Crown Cases Act (11 & 12 Vict., cap. 87). This section does not give to the tribunal to whom the points of law are referred powers to "review the case." The English Legislature in enacting article 26 of the Letters Patent might have followed closely the provisions of the Crown Cases Act. They did not think fit to

(1) (1877) 1 L.R., 2 Bom., 61.

(2) (1890) L.L.R., 17 Calc., 642.

(3) (1872) 9 Bom. H.C.R., 358

(4) (1887) L.R., 13 Q.B.D., 537.

(5) (1893) [1894] A.C., 57.

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do so. It must be taken that the variation in the language adopted by the framers of the Letters Patent in article 26 from that of the section of the Statute which evidently served as a model was not an accidental variation, but had reference to a substantial difference in the circumstances. The Court for the consideration of Crown Cases Reserved having regard to the function which it has to perform has no need to have any record of the evidence in the case before it save so far as is required to explain how the reserved points of law came to be raised. A case stated is sufficient for the purpose. Anything like an examination or weighing of the evidence is not necessary, because the Court does not assume the function of a jury. Legislating for this country, the framers of the Letters Patent found that they had to provide for a different state of things, because they presumably had before them the Evidence Act of 1855, section 57 of which casts upon a Court dealing with objections to the admissibility of evidence admitted in another Court whose decision is under consideration, the duty of appreciating the weight of the evidence which remains after that which ought not to have been admitted is put aside. The Court is enjoined not to reverse the decision if the residuum of evidence is sufficient to justify the decision, or if the decision would not have been affected by the admission or evidence improperly rejected.

If we are right in holding, as has been frequently held, that this section applies to decisions in criminal matters, the departure from the phraseology of the Statute of 1848 is explained. Obviously a case stated by the Judge would not avail and nothing short of a review of the whole evidence would suffice if the Court is to be placed in a position to comply with the provisions of the Evidence Act. I cannot assent to the argument that, notwithstanding the fact that the Legislature in the Letters Patent departed from the model of the Crown Cases Act and introduced certain words giving a power to review the case, the section is nevertheless to be construed as if the powers of this Court, in dealing with a case under article 26 of the Letters Patent, were no greater than the powers of the Court for the consideration of Crown Cases Reserved. In *Queen-Empress v. Ramchandra Govind Hirshe*(1) it was held by the Bombay High Court in 1895 that the law as settled in England by *The Queen v. Gibson*(2) and as stated by the Privy Council in *Makin v. Attorney General for New South Wales*(3) with reference to the granting of new trials when evidence has been improperly admitted does not apply to India, and that when part of the evidence which had been allowed to go to the jury was

(1) (1895) I.L.R., 19 Bom., 749.

(2) (1887) L.R., 18 Q.B.D., 537.

(3) (1893) [1894] A.C., 57.

held to be inadmissible, it was open to the High Court in appeal either to uphold the verdict upon the remaining evidence on record, or to quash the verdict and order a new trial. A different view, however, was taken by the Calcutta High Court in *Wafadar Khan v. Queen-Empress* (1). It is not necessary to express an opinion as to which of these two conflicting decisions, with reference to the powers of a High Court as a Court of Appeal in cases where evidence had been improperly admitted, is right. It is sufficient to say that in my judgment neither the decision of the Court for the consideration of Crown Cases Reserved, nor that of the Judicial Committee apply when the Court is acting in exercise of the powers conferred upon it by article 26 of the Letters Patent. The real intention of the Legislature in article 26 is not easy to determine, but I think the construction which has been placed upon it by the Calcutta and Bombay High Courts is the right one. It is at any rate consistent with the words of the article, and it seems suitable to the special circumstances in which the administration of the criminal law is carried on in this country.

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I think the objection which has been raised as to our jurisdiction to review the case upon the evidence should be overruled.

SHEPARD, J.—Agreeing generally with the judgment of the Chief Justice, I intend to confine my observations to the question raised with reference to the first count of the indictment. In this particular case the question has become comparatively unimportant in consequence of the fact that the majority of the Court are agreed that as the four counts cannot stand together, the first count must be struck out. Still, as the question has been fully argued, I think I ought to explain my views on the matter. If I have rightly understood the arguments on behalf of the prisoner, two distinct points are made against the first count. One point is that the count charges, not one but, several offences; the other and more generally important point is that a count charging a conspiracy to commit one offence and averring the doing of acts in pursuance of that conspiracy which amount to offences is not a good count according to the Indian Penal Code.

As regards the first point, it is urged on behalf of the Crown that what is charged is one conspiracy and not several conspiracies, and that the allegation of acts done in pursuance of the conspiracy are not allegations of offences committed, and that, therefore, it is wrong to say that more than one offence is charged. It seems to me that this is

(1) (1894) I.L.R., 21 Calc., 955,

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the right view. Whether, in fact, there was one engagement and not several successive engagements, whether such a conspiracy as is charged is likely to be proved to the satisfaction of a jury, and whether it is wise or fair for the prosecution to make such a charge where evidence of offences committed in pursuance of the alleged conspiracy is forthcoming—these are matters with which we are not now concerned. The simple question is whether the words in the count indicate one offence or more than one. If the count after averring the conspiracy had gone on to allege that acts not in themselves criminal had been done in pursuance of the conspiracy, it could hardly be questioned that the only charge made was that of combining together to obtain money in an illegal manner from the clerks of the department. It could not then have been urged that because the clerks were numerous, or because the agreement was maintained for a series of months that there were in fact several agreements. The evidence might have shown that that was the case, but that, as I have said, is a matter which does not concern us. Let me put the case of a man instigating another to do an act which may result or is intended to result in the death of several persons at the same time, supposing that, in fact, nothing more is alleged to have been done. According to the Penal Code mere instigation without more may be charged as an offence. Can it be said that, although the instigation consisted of one single act done at one moment of time, it must be taken that there were several instigations each of which should be charged separately? It appears to me that as there may be one instigation to commit several criminal acts, so there may be one conspiracy to do such acts—an engagement in a criminal partnership—and that is what the first count charges. The count goes on to aver in conformity with the requirements of section 107 the acts done in pursuance of the conspiracy. It cannot be said that these acts, whatever may be the character of them, are charged as criminal. The gist of the averment is that they are acts done in pursuance of the conspiracy—acts which, under section 10 of the Indian Evidence Act, are relevant for the purpose of proving the alleged conspiracy.

It was suggested from the Bench, I think, and not at the Bar that the reference in the count to section 109 of the Indian Penal Code indicating the offence abetted had been committed, shows that the intention was to charge several offences. The question whether section 109 or section 116 should be named is only material with reference to the sentence. If, by mentioning section 109, it was intended to allege that one of the two prisoners had committed the offences which were the object of the conspiracy, then no doubt the count would be open to the objection that it charged two or more offences against one

person, but I do not think that was intended. The obtaining of moneys which is averred as the act done in furtherance of the conspiracy is, within the meaning of section 109, an act committed in consequence of the abetment; and although it must almost necessarily have been itself a criminal act, it is not described in such terms as to make it criminal. If the first count had been the only count, and the prisoner had been sentenced under section 109 to a punishment which could not have been adjudged under section 116, I think the sentence would have been wrong, for the reason that the commission of the completed offence was not distinctly charged against him.

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The main argument on behalf of the prisoner was based on the proposition that conspiracy is a crime unknown to the law of India. That is a proposition which has to be examined exclusively with reference to the language of the Penal Code, and without regard to the provisions of the Code of Criminal Procedure; for it is not suggested that the latter Code, either the present Code or its predecessor of 1872 has in any respect altered the substantive law. It is said that the framers of the Indian Penal Code have, by treating conspiracy as a mode of abetment, evinced their intention to break away entirely from the English law, and that therefore no light on the subject can be derived from that source. I do not think this is the case. The points in which the law of England resembles the law of the Indian Penal Code appear to me to be quite as important as the differences. According to English law conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. Dismissing the second alternative and substituting in the first "criminal" for "unlawful" the Penal Code designates as an offence the engagement between two or more persons in a conspiracy to commit an offence. The verb "conspire" is not used, and the offence is not called conspiracy, but in substance it is the engagement in a conspiracy or the conspiring which is the offence. It is none the less so because the constituents of the offence are found in two sections of the Code and not in one as is the case with section 121-A. It is true that in order to charge the offence of conspiracy under chapter V the prosecution must aver and prove, what is not necessary to aver and prove under section 121-A, that an act has been done in pursuance of the conspiracy. Here there is a departure from English law, but the importance of the difference is greatly diminished by the fact that the Court has power in England to order the overt acts or particulars of the conspiracy to be stated for the benefit of the prisoner. Although a person cannot be convicted of abetment by conspiracy unless it is proved that an act was done in furtherance of the conspiracy the fact remains that it is the agreement which constitutes

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the offence, and this, I think, is shown by the circumstance that if one of a dozen conspirators does such an act the rest may be convicted although they were absolutely ignorant of what was done (see the illustration to section 10 of the Evidence Act) When once the conspiracy has advanced to such a point that acts in furtherance of it have been done by any member of the conspiracy the offence is complete, and I cannot understand why it should cease to be chargeable as such, because other offences have also been committed. In other words, I think that a man remains chargeable as an abettor, although he may also be chargeable as having committed the offence abetted. The cases may be rare but still cases may well happen in which it may be expedient or comparatively easy to prove the conspiracy and almost impossible to prove that the offence or offences which the conspirators had in view were committed. In my opinion, therefore, a count charging conspiracy is not bad in law, because in the averment of acts done it alleges acts which might themselves be charged as substantive offences. So long as one engagement or conspiracy is alleged and that only is the distinct offence charged, I do not think the count offends against the provisions of the Criminal Procedure Code, because other offences are averred as acts done in pursuance of the conspiracy

BENSON, J —I concur in the judgment which has been delivered by the learned Chief Justice in the various points of law which have been raised before us, except in regard to the legality and propriety of the first count of the charge. In my opinion that count is bad in law in that it offends against the provisions of the Code of Criminal Procedure which are designed to protect an accused person against the danger and difficulty of having to defend himself against a multiplicity of charges at one and the same trial. The contention that the count is drawn in accordance with the practice and procedure which obtains in the Criminal Courts in England is beside the mark, since the Criminal Procedure Code is not in force in England, and the law of procedure in the Criminal Courts of the two countries differs in many respects. The procedure of the Courts in India is regulated by the Criminal Procedure Code, and it is by its provisions that the validity of the charge must be determined.

Section 233 of that Code enacts that "for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately except in the cases mentioned in sections 234 to 236 and 239." Of these, the only exceptions that are of any importance in regard to the matter before us are those in sections 234(1) and 235(1). Section 234 provides that

“ when a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, he may be charged with, and tried at one trial for, any number of them not exceeding three;” and section 235(1) provides that “If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for every such offence.” Thus, the fundamental rule is that for each offence there must be a separate charge, and each charge must be dealt with in a separate trial; but, as exceptions to this rule, several offences committed by the same person in one and the same transaction may be tried together, as may also not more than three distinct offences of the same kind all committed within the space of one year.

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Does the first count comply with these conditions? Shortly stated it is as follows:—That you Subrahmania Ayyar and D’Santos in March 1896 did conspire and combine together, and thereafter until November 1898 did continue to conspire and combine for the purpose of extorting bribes for Subrahmania Ayyar, in pursuance of which conspiracy Subrahmania Ayyar did obtain for himself through D’Santos divers sums of money, from various persons at various times, and thereby committed an offence punishable under sections 109 and 384, and under sections 109 and 161 of the Indian Penal Code. Four persons are named as having paid the bribes. The first of these is said to have paid (an unstated number of) sums aggregating Rs 680 in the course of the three years 1896—1898; the second is said to have paid three sums, the third one sum, and the fourth four sums on various specified dates. Here it is necessary to bear in mind the distinction between the English and the Indian law in regard to conspiracy. Under English law the mere agreement to commit an offence is itself an offence, but under the Indian Penal Code this is not so except as regards certain offences against the State under section 121, Indian Penal Code. So far as other offences are concerned conspiracy is dealt with merely as one of the modes of abetment, and the mere agreement or conspiracy to commit an offence is not an offence unless some act or illegal omission takes place in pursuance of the agreement and in order to the commission of the offence (sections 107 and 108). The act need not be a Criminal Act, still less the offence abetted. It is enough if any act is done in pursuance of the conspiracy and in order to the commission of the offence abetted. If the offence abetted is committed in consequence of the abetment, the punishment is the same as for the offence abetted (section 109). Even if the offence is

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Let us now consider the first count of the charge against the accused.

The learned Advocate-General contends that what is charged in this count is merely a single conspiracy or agreement to extort bribes, and that though the conspiracy continued for some two years and eight months, and was evidenced by the payment of many sums of money by various persons and at various times during that period, yet only one offence is charged, viz., a conspiracy to extort bribes. In my judgment, however, it is difficult to accept this contention. If the allegations in the count are analysed they seem to set forth not a single agreement to extort, but a series of such agreements extending over nearly three years. It is not contended, nor is it possible to contend, that there was from the beginning a conspiracy to extort all the various sums mentioned in the charge. There was only an agreement to extort money generally at first, and from time to time thereafter as opportunity arose, there were further agreements or conspiracies to extort the particular sum or sums then in view. This, I think, is the only meaning which can with accuracy be attached to the words "did thereafter continue to conspire". The words cannot refer to a single agreement, but must refer to a succession of agreements. No doubt the agreements to extort the particular sums may have been in pursuance of an original arrangement, but each agreement to extort any sum followed by an act in pursuance of the agreement was by itself a separate and complete offence of abetment of extortion and might have been charged by itself as such offence. If each of these agreements had been separately charged, not more than three of them (occurring within one year) could have been tried together at one trial in accordance with section 234 of the Criminal Procedure Code. But the prosecution, by treating the first count as if it referred to a single offence only, has let in evidence in regard to what is in reality a series of many offences, and has thus rendered the protection designed by sections 233 and 234 nugatory. The prosecution cannot, in my judgment, get rid of the fact that a series of separate agreements or conspiracies are charged, by saying that those conspiracies were in pursuance of an original arrangement. The charge is not only that there was a conspiracy in March 1896, but that, thereafter, during nearly three years, the accused did continue to conspire, and in pursuance of the same, did obtain various sums of money at various

times and from various persons. Each time they conspired and obtained money in pursuance of the same there was a separate and complete offence.

It is easy to understand that there might be a conspiracy consisting of a series of agreements, extending over years, to commit a single offence as the final outcome of the conspiracy. Such a conspiracy might well be called a continuing conspiracy. So long as it was a conspiracy only, no offence would, under the Indian law, be committed; but as soon as an act was done in pursuance of the conspiracy, and in order to commit the offence abetted, then the offence of abetment of an offence would be complete, and there would be only a single offence of abetment, though there had been a series of agreements leading up to it. In the same way there might be a single agreement to commit a number of offences. Such agreement (when followed by an act in pursuance of the agreement and in order to the commission of the offence) would be a single offence, not a series of offences. But neither of these is the kind of conspiracy charged against the accused in the present case. Here there are alleged a series of acts from March 1896 to November 1898, done in pursuance of the series of agreements implied in the words "did continue to conspire and combine." This series of agreements, followed by a series of acts done in pursuance of the agreements, constitutes, in my judgment, a series of separate and complete offences, for each of which a separate charge ought to have been framed under section 233 of the Criminal Procedure Code. A number of such offences cannot be charged together by saying that they evidence a continuing conspiracy to commit offences of the kind generally, since to do so would render nugatory a protection given by section 233. Three of these charges (but only three) provided they occurred within one year from first to last, might have been tried at one trial under section 234, Criminal Procedure Code. As there were in reality many more than three of these offences involved in the first count, and as they were spread over a longer period than one year, that count is, in my opinion, bad in law.

In dealing with this first count I have proceeded on the supposition that the acts referred to therein are not necessarily offences. The argument would be good, even though all the acts were innocent in themselves. There can, however, be little doubt but that the acts referred to were in themselves offences. Three of the acts are, in fact, charged in the second, fourth and sixth counts as separate offences, and there is nothing to suggest that the other acts were of a different character, while the reference in the count to section 109, Indian Penal

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Code, indicates that the offence abetted was actually committed. If the acts in themselves offences, the argument against the propriety of the first count becomes the more cogent. The exception provided in section 235(1) has, in my judgment, no application to the facts of the present case since it is impossible to hold that the series of acts to which I have referred were so connected together as to form "the same transaction" within the meaning of that section. There were at least four sets of transactions connected with the payments made by the four persons named in the count, and the only connection that appears between the transactions is that in each case the blackmail was paid to the same persons, viz, the accused.

In the result, then, the first count of the charge is, in my judgment, bad in law in that it offends against the limitation imposed by section 233, Criminal Procedure Code * * *

MOORE, J.— . . . In my opinion the objection raised to the first count is a valid one, and it must be held that that count was bad in law. (After stating the count the learned Judge continued:—) It was, therefore, charged against the prisoners that they had made forty-one illegal collections from four clerks on forty-one distinct occasions dating from March 1896 to November 1898. Such being the case, it appears to me that it must be held that the prisoners were in fact charged on the first count with having committed forty-one distinct offences of abetment of extortion where the extortion was committed in consequence of the abetment on forty-one different occasions ranging over a period of two years and eight months and of having committed forty-one similar distinct offences of abetment of bribery, and that the first count is therefore bad as having been framed in contravention of sections 233 and 234 of the Criminal Procedure Code, which provide that there must be a separate charge for every distinct offence, and that not more than three of such offences, and those three committed within one calendar year, shall be charged and tried at one trial. An attempt has been made to show that the count is good, as framed, by the argument that the several acts of extortion or bribery there set out should not be looked on as distinct offences but merely as illustrations showing the general nature of the acts committed by the prisoners in pursuance of the agreement or conspiracy entered into between them. It is also contended that it is not alleged in the count that the several sums there set forth as having been received by the conspirators were extorted by them or received as bribes. It is urged that they may have been taken as presents without any dishonest or improper intention, and that there is no allegation to the contrary in the count. It does not appear to me that there is any force in these arguments. The several

acts of extortion and bribery set out in the count are not there mentioned as being illustrative of any other distinct specific act of extortion or bribery, but are there entered as the several acts of extortion and bribery, the commission of which was abetted by the prisoners by conspiracy. It also cannot be admitted that the count leaves it an open question as to whether the several sums were extorted or obtained as bribes or were received innocently as presents. It is there distinctly charged that the accused persons entered into a conspiracy to extort money and receive illegal gratifications, that in pursuance of that conspiracy they received certain sums. and that they thereby committed offences under sections 109 and 384 and 109 and 161 of the Indian Penal Code. If the acts abetted, *viz.*, acts of extortion and bribe-taking, were not committed in pursuance of the conspiracy and nothing more followed than the innocent receipt of presents, a charge under section 109, it is clear, could not be sustained. I further cannot find in either the Code of Criminal Procedure or the Law of Evidence any warrant for setting out a number of acts as illustrative (whatever that may mean) of the main offence charged and then admitting a mass of evidence to prove the commission of these so-called illustrative acts. Such a procedure is, in my opinion, irregular and illegal. It is also urged that the several acts of extortion and bribery mentioned in this count should not be looked upon as being there set forth as separate offences of extortion and bribery carried out in consequence of abetment by the prisoners, but as overt acts committed in pursuance of the conspiracy into which it is alleged that the prisoners had entered, which are accordingly set out in the count as showing the existence of the conspiracy. The flaw in this argument, to my mind, is that it appears to be founded on the assumption that the offence with which the prisoners are charged is conspiracy. The charge has, in fact, as will be found by a reference to similar charges set forth in Archbold's 'Pleading and Evidence in Criminal Cases,' been framed as if it were a charge of conspiracy drawn up under the law in force in England, although it is, in my opinion, very doubtful if even under the English law such a count as this could be held to be good. In India, however, there is no such offence as conspiracy, with the single exception of conspiracy to wage war against the Queen (section 121-A, Indian Penal Code). What the prisoners are charged with is not conspiracy as such, but with having by conspiracy abetted the commission of forty-one distinct acts of extortion or bribery, which acts were committed in consequence of such abetment. Such a charge would, in my opinion, require to be set out in forty-one separate counts. It is further contended that the series of acts alleged to have been committed by the prisoners were so connected together as to form one transaction and

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that, such being the case, the prisoners could, under section 235, Criminal Procedure Code, have been charged with and tried at one trial for all such offences. It appears to me, however, that it cannot possibly be held that forty-one acts of extortion or taking of bribes from four persons committed at various dates for a period of over two years were so connected as to form one transaction.

For these reasons I am of opinion that the first count of the charge now under consideration must be held to be bad; on the other questions raised in the certificate of the officiating Advocate-General I concur with the judgment that has been pronounced by the learned Chief Justice.

DAVIES, J.—The first point for our consideration on the certificate of the officiating Advocate-General, is whether the tender of a pardon to D'Santos, second accused in the case, by the learned Judge who presided at the trial was legal, and if it was not legal, whether the evidence given by D'Santos under colour of the pardon was admissible. On the first part of the question I am in agreement with my learned colleagues that the tender of the pardon was illegal, inasmuch as the offences that were being tried were not offences exclusively triable by the High Court. Section 338 read with section 337 of the Criminal Procedure Code is conclusive on the point. But as to the second part of the question I am unable to agree with them that the evidence given by D'Santos was nevertheless admissible. It is quite certain that when D'Santos gave his evidence he was not a convicted person, for it is only to a person under trial that a pardon can be tendered by a Judge. It is true that D'Santos had at the time pleaded guilty of the charges, but the learned Judge's record shows that he had not been convicted on that plea, and, in fact, he was not convicted until after his pardon had been forfeited, which was after he had given his evidence. It is also certain that at the time D'Santos gave his evidence he was not an acquitted person, nor had he been discharged. It follows, therefore, that he was still an accused person under trial awaiting judgment of either acquittal, conviction, or discharge. Thus, being an accused person in the case he could not, at the same time, be a competent witness therein, save and except that he was giving his evidence under a legal tender of pardon. The pardon tendered here being illegal, D'Santos was otherwise incapable, so long as he stood accused and unconvicted in the case, of giving evidence on oath (section 342, Code of Criminal Procedure, and section 5 of the Oaths Act, 1873). I therefore hold the evidence inadmissible on this technical ground that it had not the sanction of a valid oath or affirmation. Apart from this, however, I consider that the circumstances under which D'Santos' evidence was given altogether vitiated it. It was

given by him under the false impression that he was a pardoned person, not as a person expecting sentence on his plea of guilty. The statements made by D'Santos were made under the inducement of a pardon, and were therefore not made freely as by a self-condemned man. He was crouching under the shelter of a pardon, and not manfully making a clean breast of his guilt fearless of consequences. Had D'Santos been aware that the pardon that he had accepted was of no avail to him, who can tell, under such altered circumstances, what evidence he would have given, if he had given any? The view I am taking of the absolute inadmissibility of the evidence of D'Santos is the view taken by two learned Judges of the Bombay High Court, Melvill and Kemball, JJ., in *Reg v. Hanmanta*(1). Though my learned colleagues hold differently they have practically put aside the evidence of D'Santos as of no value: so it is unnecessary for me to labour the point further.

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The second question for our consideration is as to the legality of the first count of the indictment with which I proceed to deal. My opinion on this matter is in accord with the opinions of Benson and Moore, JJ.

(After stating the first count and the charge that the two accused thereby committed an offence punishable under sections 109 and 384, and sections 109 and 161 of the Penal Code, the learned Judge continued):—A reference to these sections will show that the charges against the accused were the abetment of extortion and the abetment of taking illegal gratification, and that the offences abetted had in each case been committed in consequence of the abetment. For such is the force of section 109 of the Penal Code. Now, the question becomes material, by whom were the offences committed. If it was by the first accused it is obvious that he could not be charged with abetting offences committed by himself. The abetted person is, and always must be, a different person from the abettor. For instance, the official who takes the bribe cannot be the abettor of the offence. He is the offender, and it is the person who offers the bribe who is the abettor as shown by illustration (a) to section 109 of the Indian Penal Code. The illustration (c) of the same section further elucidates the point. It runs as follows:—“A and B conspire to poison Z. A in pursuance of the conspiracy procures the poison and delivers it to B in order that he may administer it to Z. B in pursuance of the conspiracy administers the poison to Z in A's absence, and thereby causes Z's death. Here B is guilty of murder. A is guilty of abetting that offence by conspiracy and is liable to the punishment

1) (1877) I.L.R., 1 Bom., 610.

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for murder." This shows that when only two persons conspire to commit an offence and one of them commits the offence, he is guilty of that offence and it is only the other who is guilty of the abetment. I do not suggest that two persons could not be charged with conspiring that one or the other of them should commit an offence, and I think such a charge would be good in a case where the offence was not committed. But when the offence is committed by one or the other of them that one ceases to be an abettor and becomes the principal, by which I mean the person who actually commits the offence abetted; and he must therefore be charged with the commission of the offence abetted, and not with the abetment thereof. In this case it is certain from the particulars given in the first count and in the succeeding counts, second to seventh, that according to the prosecution the first accused was the principal offender and that the second accused alone was the abettor. The first accused was therefore wrongly charged jointly with the second accused with the offence of abetment by conspiracy. The first count is consequently bad on account of this misjoinder. It is also bad for multifariousness. The patent flaw in the count, namely, charging the commission of the two offences,—(1) of the abetment of extortion, and (2) the abetment of bribery as one offence—is not as harmless as it would at first sight appear to be. If the prosecution really meant to charge a conspiracy in respect of only one of the offences, extortion or bribery, they should have struck out the other. But, as the charge was left to stand, the accused had no notice whether the several overt acts alleged against them were instances of offences of both bribery and extortion or of one of those offences exclusive of the other. In the former case the charge would be inconsistent, as bribery and extortion are two entirely distinct offences under the Penal Code, one falling under chapter IX "offences by or relating to public servants," and the other under chapter XVII "offences against property," and a conviction on the same facts could not have been had on both charges together, but only in the alternative. In the latter case the accused had a right to be told which of the nine alleged illegal payments were obtained by bribery and which by extortion. There was thus a marked vagueness in this omnibus charge. Had it been made more definite in the matters referred to, its multifariousness would have been apparent on the face of it. A fuller examination of it will, however, sufficiently disclose how radically bad it is in that respect. The first of the nine illegal payments relates to an aggregate sum of Rs. 680 said to have been paid by one Kalyana Chetti in the years 1896, 1897 and 1898. No details are given of the exact or approximate dates of the payments

or of the several amounts paid, but we are informed that the evidence of Kalyana Chetti would show that some thirty separate payments extending over a period of two and-a-half years were made, every separate payment constituting a separate offence. The general law is that for every distinct offence there shall be a separate charge, and every such charge shall be tried separately (section 233, Code of Criminal Procedure). But under the next section (234) a person may be tried at one trial for not more than three offences, if those three offences are of the same kind and are committed within the space of twelve months from the first to the last of them. Here however we have thirty offences not shown to be of the same kind and extending over two and-a-half years, which there is nothing to justify. The special provision in section 222, clause (2) of the same Code, for the case of criminal breach of trust or criminal misappropriation of money whereby a gross sum is allowed to be stated in the charge without specifying particular items or exact dates, is not applicable to this case which is one of bribery or extortion, and even in the excepted case the time which the gross sum may cover is limited to a year. The other eight items of the alleged illegal payments do not offend in respect of want of details, but they do in respect of time, ranging from August 1896 to November 1898. The second, third and fourth items are sums of Rs. 100, Rs. 50 and Rs. 100 said to have been paid by one Balasundara Mudali in August 1896, March 1897, and May 1897, respectively, and they form the subject of the specific charges against the two accused in the six other counts of the indictment. The fifth item is a sum of Rs. 100 said to have been paid by K Srinivasa Chari in October 1898. The remaining items (6, 7, 8 and 9) are small sums, two of Rs. 5 and two of Rs. 3 said to have been paid by one C. Vedachalam in August, September, October and November 1898. Now there can be no doubt that each one of these thirty-eight alleged illegal payments made either by the same person at different times or by different persons at the same time constituted a separate offence, that is, that there were thirty-eight distinct offences and that only three of them committed in the course of twelve months could properly have been tried together. There is no ground for the contention that the case ought to be treated as one falling under section 235 of the Criminal Procedure Code, whereby any number of offences may be tried at one trial if they are a "series of acts so connected together as to form the same transaction." If it could be urged with any force in regard to Kalyana Chetti's case that there was a running compact with him to pay so much every month how could that transaction possibly be the same as those entered

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into separately with each of the other three clerks at different times? The only real ground on which it was attempted to justify the charge was that the charge was one of a continuing conspiracy and the various illegal payments were only set forth as proofs of that conspiracy. Excepting the offence of conspiracy to wage war against the Queen punishable under section 121-A of the Indian Penal Code, there is no other offence of conspiracy as such under the penal law of India. There is of course the offence of abetment by conspiracy, but to constitute the offence of abetment by conspiracy or by any other form of abetment, the abetment must be of an offence or what would ordinarily be an offence (section 108 of the Indian Penal Code). So that abetment by conspiracy or otherwise cannot be charged by itself as a substantive offence. The abetment must be linked with, or refer to the particular offence, the commission of which was its object. In this case that offence was extortion or bribery and every time the commission of that offence was abetted a separate offence of the abetment of that offence was committed and a separate charge lay. It would be a clear evasion of the law to allow a wholesale clubbing of a number of separate offences under a single charge of abetment. Each offence abetted makes a separate offence of abetment, and more than one of such offences can be tried together only under the provisions of sections 234 and 235, Code of Criminal Procedure, which provisions have not been complied with in the present case. Such I venture to declare is the law and practice throughout India; at all events no authority to the contrary has been cited at the Bar. It is scarcely necessary to remark that the reason for the law is to prevent accused persons being prejudiced in the eyes of the Court or jury and confused in their defence by the multiplicity of accusations roughly heaped against them. I am therefore clearly of opinion that the first count of the indictment is unsustainable in law, and that the conviction upon it must be quashed.

The third question is whether the trial of the first accused on the first, second, fourth and sixth counts, that is on four different counts at one trial, was not illegal. On this question I am in agreement with the majority of the Court and follow the judgment of the learned Chief Justice on the point. I also agree with reference to the inquiry to be made into the evidence in the case, that the one count which should be struck out from further consideration out of the four should be the first count as it is bad in itself. * * *

As to the sixth and last question it seems to me immaterial to decide whether the learned Judge misdirected the jury inasmuch as the Court has resolved to go itself into the evidence in the case.

With that resolution I agree, as it seems clear, that we have no power to order a new trial. But at the same time I think our review of the evidence should be limited to seeing whether independently of the evidence on the first count which forms the bulk of the record and which we are bodily rejecting, there is sufficient evidence left to justify the jury's verdict of guilty on the second and sixth counts of the charge, and that our inquiry should not be extended with a view to our giving our own independent judgment upon the facts. I take it that the "sufficient" evidence referred to in section 167 of the Evidence Act under which we are proceeding would in the case of a verdict by a jury be such good and accredited evidence as the jury were bound to have convicted upon; that is, if they had not convicted upon it, it would have been what we term a "perverse verdict." If there was doubtful or conflicting evidence upon which it was quite open to the jury fairly to return a verdict of "not guilty," I do not think it lies in us to say that the evidence was sufficient to support a conviction by a jury

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BODDAM, J.—I agree with the judgment of the learned Chief Justice except in one particular. Granted that the first count is good, I do not think that there is any objection to the indictment as a whole. I do not think that the joinder of the first count with the second, fourth, and sixth is forbidden by the Criminal Procedure Code. I think it comes within either section 235 or section 236 of the Code.

(After stating the first, second, fourth and sixth counts, the learned Judge continued:—) As it seems to me, the acts alleged in the second, fourth and sixth counts are identical with the acts alleged with others in the first count as overt acts showing the conspiracy and are within section 235. The only difference lies in the way in which the acts are charged and the inference to be drawn by the jury from them. In the first count all the acts are alleged as one series of acts so connected together as to form the same transaction from which the jury are asked to infer (as they did) that there was a continuing conspiracy whereby the accused and D'Santos abetted one another in extorting bribes from clerks. In each of the remaining counts, respectively, viz., the second, fourth and sixth counts, one of the above-mentioned acts is set out separately, and is charged as itself constituting a separate offence. The accused was therefore only charged and tried for offences committed in one series of acts so connected together as to form one and the same transaction as he lawfully might be under section 235(1). Moreover, it also falls within section 235(3) which says:—"If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute

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when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, and for any offence constituted by any one or more of such acts." Here, in the first count, the accused is charged with the offence to be inferred as constituted by the combined acts (along with others) which are alleged in the other counts as constituting separate offences, and he may therefore be tried at one trial for the offence to be inferred from the combined acts as well as for each offence constituted by the separate acts alleged. Even if this were not so, the case falls, to my mind, within section 236, which says—"If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences." Here all the series of acts stated in the second, fourth and sixth counts are alleged in the first count with others. They are there alleged in that count as proving one offence, viz, abetment by conspiracy to extort bribes from clerks, &c, and they are set out as overt acts. The very same acts are set out separately in the second, fourth and sixth counts and are charged as respectively constituting separate offences. It was doubtful if all the series of acts together constituted the offence as alleged in the first count, and therefore some of them are set out and charged as constituting other offences in the other counts respectively of the indictment, and the section says any number of such charges may be tried together. It seems to me clear that an indictment may contain any number of variations in charges which depend upon the same facts. The object of the Legislature is to confine the prosecution to proving only such facts as constitute one charge if taken together, but when they constitute together one charge there is nothing to prevent the same facts being separated and also made applicable to any number of other charges if they constitute several different offences. Here the whole of the facts are set forth and were proved in support of the charge contained in the first count, and the remaining counts contain merely a reiteration of some of the facts alleged in the first count and were proved or sought to be proved by the evidence called in support of the first count.

I, therefore, think that the indictment, as a whole, was unobjectionable. * * * *

Mr. J. D. Mayne, for the appellant, contended that the conviction was illegal on the following grounds:—*First*—The

evidence of D'Santos was inadmissible—(a) The pardon to D'Santos was wrongly granted, the case not being one triable exclusively by the High Court—*Queen-Empress v. Sadhee Kasal*(1) and sections 337, 338, and 339 of the Criminal Procedure Code; the procedure as to the offer of the pardon being illegal, the evidence given under it was inadmissible: (b) D'Santos was “an accused person” within the meaning of the Criminal Procedure Code—see section 271. He was therefore not a person who could have an oath administered to him, or be a competent witness in the case; he came within the terms of section 5 of the Oaths Act (X of 1873)—Criminal Procedure Code, sections 209, 342 and *Queen-Empress v. Chinna Pavuchi*(2). A person on trial is an accused person until his innocence or guilt is finally determined by his conviction or acquittal; when giving his evidence D'Santos was still on his trial, and his evidence was therefore inadmissible: (c) No influence can be lawfully used to induce an accused person to withhold or disclose anything—section 343 of the Criminal Procedure Code; Evidence Act (I of 1872), section 24. The procedure taken as to D'Santos was in pursuance of an arrangement by the Crown with him by which he pleaded guilty with a view to getting a pardon; this was an inducement to confess, and his evidence was therefore inadmissible—*Reg v. Hannanta*(3), *Queen-Empress v. Dala Jiva*(4), *Empress of India v. Asghar Ali*(5) and Evidence Act, section 132.

Second—The charge of conspiracy was illegal. The only substantive offence of conspiracy in the Penal Code is conspiracy against the sovereign; section 121 of the Indian Penal Code (Act XLV of 1860); see *Mulcahy v. The Queen*(6). No other conspiracy is an offence unless it amounts to abetment—Penal Code, sections 107, 108, 109; and then it is punishable as abetment, not as conspiracy. There is no abetment until an act or illegal omission follows on conspiracy, and nothing is punishable except abetment of an act committed (Penal Code, sections 109–114; see section 111), or not committed (Penal Code, sections 115, 116). The first count as to conspiracy charges a series of acts, each of which amounts to an abetment, and the whole of which constitute a series of separate offences continuing for more than two years; this

(1) (1884) I L R., 10 Cal., 936

(3) (1877) I L R., 1 Bom., 610, at p 617.

(5) (1879) I L R., 2 All., 260.

(2) (1899) I L R., 23 Mad., 151.

(4) (1885) I L R., 10 Bom., 190.

(6) (1868) L.R., 3 H.L., 306.

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Third—The trial of the appellant on the first, second, fourth and sixth counts at one trial was illegal as being a joinder of charges prohibited by section 234 of the Criminal Procedure Code, and cannot be justified as coming within sections 235 and 236. This misjoinder of charges, and the other errors, occasioned a failure of justice and were not mere irregularities which could be remedied by section 537 of the Criminal Procedure Code, but made the conviction wholly illegal—(a) The High Court had no power to amend the indictment (Letters Patent, 1865, articles 26, 27, 28; Criminal Procedure Code, sections 226–231 and 439). There is no provision of law giving them power to strike out a charge, and proceed to a conviction on the rest of the indictment; the only remedy would be a new trial, and there was no power to grant a new trial in this case: (b) As to the effect of such errors on the conviction, the result of the cases is that it is wholly bad, and cannot be cured by section 537 of the Criminal Procedure Code, (*In the matter of Luchmunaram*(1), *Queen-Empress v. Chandu Singh*(2), *Queen-Empress v. Fakirapa*(3), *In the matter of Abdur Rahman*(4), and the cases there cited).

Fourth—The Court had no power either under article 26 of the Letters Patent or section 167 of the Evidence Act or under the Criminal Procedure Code, to decide the case on the residue of the evidence—(a) Letters Patent, article 26, gives the High Court power only to review the case with a view to decide the point of law referred, and, if necessary, to pass a fresh sentence: they cannot substitute a verdict of their own on the evidence for the verdict of the jury: (b) Evidence Act, section 167, gives no power to do so in a case like this where the objection to the conviction is not limited to improper reception of evidence; it cannot affect the Letters Patent, to which it does not refer, or extend the powers given by article 26. It has also been doubted whether it applies at all to criminal cases (*Reg. v. Navroji Dadabhai*(5); see section 57 of Act II of 1855, the former

(1) (1886) I.L.R., 14 Calc., 128, at p. 131.

(2) (1887) I.L.R., 14 Calc., 395.

(3) (1890) I.L.R., 15 Bom., 491, at pp. 498, 505.

(4) (1900) I.L.R., 27 Calc., 839, at pp. 844, 845, 847.

(5) (1872) 9 Bom. H.C.R., 358, at p. 376.

Evidence Act for India : (c) The Criminal Procedure Code has no provision giving any such power; see sections 267, 434 of that Code. The Act establishing the Court for the consideration of Crown Cases Reserved (11 & 12 Vict, cap 78), section 2 was referred to and compared with article 26 of the Letters Patent. In the English Act the power to review is omitted as all the necessary facts are stated in the case reserved, and the Court has power "to reverse, affirm, or amend any judgment or to make such other order as justice may require" (*Regina v Mellor*(1), *The Queen v Gibson*(2), *Reg v Navroji Dadabhai*(3), *Queen v. Hurribole Chunder Ghose*(4), *Imperatrix v. Pitamber Jina*(5), *Queen-Empress v. O'Hara*(6), *Wafadar Khan v. Queen-Empress*(7) and *Malin v Attorney-General for New South Wales*(8), a case decided on section 423 of the Colonial Act (46 Vict, cap. 17) which is similar to article 26 of the Letters Patent combined with section 537 of the Criminal Procedure Code).

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Fifth—Even if there was power in the Court to convict the accused on the residue of the evidence, there was not sufficient evidence to establish his complicity with the corrupt acts of D'Santos, and to support the conviction. The only evidence was that of Balasundara, an accomplice, and his evidence is not corroborated. It is settled law in all the Courts in India that an accused person cannot be convicted on the uncorroborated evidence of an accomplice.

Sixth—As to costs: if the conviction is set aside the case of *Macleod v. Attorney-General for New South Wales*(9) should be followed.

Mr. A. Phillips, for the Crown, contended: *First*—That the charges were properly tried together. The acts alleged in the first charge as done in pursuance of the conspiracy were not charged as in themselves offences, and might be acts in themselves innocent, although as the fruit of a criminal conspiracy they completed the offence of abetment. Out of the various acts completing the offence of abetment, three were selected as in themselves criminal acts. The conspiracy was the foundation

(1) (1858) D. & B., 468, at pp 502, 519.

(3) (1872) 9 Bom H.C.R., 358, at p. 376.

(4) (1876) I.L.R., 1 Calc., 207, at pp. 216, 217.

(6) (1890) I L.R., 17 Calc., 642.

(8) (1893) [1894] A.C., 57

(2) (1887) I R., 18 Q B D., 537

(5) (1877) I L.R., 2 Bom., 61.

(7) (1894) I.L.R., 21 Calc., 955.

(9) (1891) [1891] A.C., 455.

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and underlying basis of them all, and consequently charges founded upon any number of such acts could, it was submitted, be tried together under section 235 of the Criminal Procedure Code. Conspiracy to do a thing and the doing of that thing are "one transaction"; one transaction although more than one offence is committed, falling within different definitions in the Penal Code: sections 107, 108, 109 and 121-A were referred to. *Second*—That if the charges were not such as were proper to be tried together under the Criminal Procedure Code, article 26 of the Letters Patent requires the High Court to make such alteration in the sentence as justice requires. If the Legislature has prescribed the course to be pursued, in such a case the Court has, of course, only the duty of following that course. But in the present case the Legislature has not indicated the consequences of a deviation from the rule contained in section 233 of the Criminal Procedure Code, otherwise than by section 537 which is applicable only to irregularities which do not render the proceedings null and void. In the present case the deviation from the prescribed course did not, it was submitted, render the proceedings null and void. The acts which were alleged in the first charge, although more than three, could have been given in evidence under the charges which were not liable to objection; and consequently such evidence would, in any case, have been submitted to the jury. The High Court having substantially reduced the punishment originally inflicted, justice, it was submitted, was satisfied, and the sentence thus reduced should be allowed to stand. *In the matter of Luchminaram*(1), *Queen-Empress v. Chandi Singh*(2), *In the matter of Abdur Rahman*(3) and *Queen-Empress v. O'Hara*(4), were referred to.

Mr. Mayne replied.

Afterwards, on 2nd August 1901, the judgment of their Lordships was delivered by the LORD CHANCELLOR.

JUDGMENT.—In this case the appellant was tried on an indictment in which he was charged with no less than forty-one acts, these acts extending over a period of two years. This was plainly in contravention of the Code of Criminal Procedure,

(1) (1886) I.L.R., 14 Calc., 128, at p. 131. (2) (1887) I.L.R., 14 Calc., 395.

(3) (1900) I.L.R., 27 Calc., 839, at pp. 844, 845, 847.

(4) (1890) I.L.R., 17 Calc., 642.

section 234, which provided that a person may only be tried for three offences of the same kind if committed within a period of twelve months. The reason of such a provision, which is analogous to our own provisions in respect of embezzlement, is obviously in order that the jury may not be prejudiced by the multitude of charges and the inconvenience of hearing together of such a number of instances of culpability and the consequent embarrassment both to Judges and accused. It is likely to cause confusion and to interfere with the definite proof of a distinct offence which it is the object of all criminal procedure to obtain. The policy of such a provision is manifest and the necessity of a system of written accusation specifying a definite criminal offence is of the essence of criminal procedure.

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Their Lordships think that the course pursued and which was plainly illegal cannot be amended by arranging afterwards what might or might not have been properly submitted to the jury.

Upon the assumption that the trial was illegally conducted it is idle to suggest that there is enough left upon the indictment upon which a conviction might have been supported if the accused had been properly tried. The mischief sought to be avoided by the Statute has been done. The effect of the multitude of charges before the jury has not been averted by dissecting the verdict afterwards and appropriating the finding of guilty only to such parts of the written accusation as ought to have been submitted to the jury.

It would in the first place leave to the Court the functions of the jury and the accused would never have really been tried at all upon the charge arranged afterwards by the Court.

Their Lordships cannot regard this as cured by section 537.

Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment. The illustration of the section itself sufficiently shows what was meant.

The remedying of mere irregularities is familiar in most systems of jurisprudence but it would be an extraordinary extension of such a branch of administering the criminal law to

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say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission, or irregularity.

Some pertinent observations are made upon the subject by Lord Herschell and Lord Russell of Killowen in *Smurthwaite v. Hannay*(1). Where in a civil case several causes of action were joined Lord Herschell says that "if unwarranted by any enactment or rule it is much more than an irregularity," and Lord Russell of Killowen in the same case says, "Such a joinder of plaintiffs is more than an irregularity, it is the constitution of a suit in a way not authorised by law and the rules applicable to procedure."

With all respect to Sir Francis Maclean and the other Judges who agreed with him in the case of *In the matter of Abdur Rahman*(2) he appears to have fallen into a very manifest logical error in arguing that because all irregularities are illegal as he says in a sense and this trial was illegal that therefore all things that may in his view be called illegal are therefore by that one adjective applied to them become equal in importance and are susceptible of being treated alike. But this trial was prohibited in the mode in which it was conducted, and their Lordships will humbly advise His Majesty that the conviction should be set aside. Their Lordships will make no order as to costs.

Appeal allowed : conviction set aside.

Solicitor for the appellant : Mr. R. T. Tasker.

Solicitor for the respondent : The Solicitor, India Office.

(1) [1894] A.C., 494. (2) (1900) I.L.R., 27, Calc., 839.

APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Davies, Mr. Justice Benson and Mr. Justice
Bhashyam Ayyangar.*

AHAMED KUTTI (DEFENDANT No. 19), APPELLANT,

v.

RAMAN NAMBU DRI (PLAINTIFF), RESPONDENT.*

1900.
October
18, 19.
1901.
October
2, 3, 4.

*Limitation Act—Act XV of 1877, sched II, art. 134—Inapplicability to case of
involuntary sale.*

Where, in execution of a money-decree, immoveable property of a judgment-debtor, in which his real interest is only that of a mortgagee, is attached and brought to sale, the auction-purchaser is not a purchaser from the mortgagee within the meaning of article 134 of schedule II of the Limitation Act, even though the property was sold as the property of the judgment-debtor without any limitation of his interest therein. Article 134 only applies to cases in which the mortgagee disposes of the property voluntarily. *Muthu v. Kambalinga*, (I.L.R., 12 Mad., 316), overruled.

Per SHEPARD and DAVIES, JJ—Where a purchase is made at a sale by the Court in execution of a decree, it is complete, for purposes of limitation, at the date of the purchase, and not at the date of its confirmation by the Court.

SUIT to redeem a kanom. Plaintiff's father, in 1864, granted a kanom in respect of certain properties to one Raman Menon deceased, the karnavan of defendants Nos. 1 to 14. Plaintiff now sued to redeem that kanom. Defendants Nos. 15 to 18 were impleaded as persons in possession of portions of the property. Defendant No. 19 denied the genuineness of the kanom and contended that the properties had formerly been the jenm of the tarwad of defendants Nos. 1 to 14, and that they had been sold at a Court sale held in execution of the decree in Original Suit No. 409 of 1880, being purchased by one Koma Panikar on 18th January 1886. Defendant No. 19 subsequently, in execution of a decree in Original Suit No. 10 of 1890, purchased, also at a Court sale, the jenm right of Koma Panikar in certain items of the property now sought to be redeemed. His defence was that inasmuch as the said items had been purchased by

* Second Appeal No. 1008 of 1899 against the decree of O. Chandu Menon, Subordinate Judge of South Malabar, in Appeal Suit No. 116 of 1899, modifying the decree of T. V. Anantan Nayar, District Munsif of Kutnad, in Original Suit No. 49 of 1898.

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his predecessor in title more than twelve years before suit plaintiff's claim to recover possession of them was barred by article 134 of the Limitation Act. The suit was filed on 25th January 1898.

The District Munsif held that the kanom demise of 1864 was a genuine one and that plaintiff was entitled to recover all the properties except those claimed by defendant No. 19. With regard to these he held, following *Muthu v. Kambalinga*(1), that plaintiff's claim was barred under article 134 of the Limitation Act.

Plaintiff appealed to the Subordinate Judge who held that the period of limitation should be computed from the date of the confirmation of sale and not from the date of actual sale. The date on which the sale to Koma Panikar was confirmed by the Court was 19th March 1886. He held that the suit was not barred, and gave plaintiff a decree as prayed.

Against that decree defendant No. 19 preferred this second appeal.

The case first came on for hearing before SHEPHARD and DAVIES, JJ., when their Lordships passed the following

ORDER OF REFERENCE TO THE FULL BENCH.—Assuming that article 134 of the Limitation Act applies in a case where the defendant has bought at a sale held in execution of a decree, we think that the date of the sale, and not the date of the confirmation of the sale, is the date of the purchase for the purpose of that article. From the date of the sale the person to whom the property has been knocked down is designated in the Code of Civil Procedure by no other name than purchaser. On that date he incurs obligations as purchaser and acquires an interest in the property (see *Venkatalingam v. Veerasami*(2)). We cannot suppose that the Legislature used the word purchaser in the Limitation Act in a different sense. But on the question whether article 134 applies to the case of involuntary sales made under the provisions of the Code, we are of opinion that the ruling in *Muthu v. Kambalinga*(1) cannot be supported. We do not think it is possible to say that a man who buys the property of a judgment-debtor which has been attached in execution of a decree buys that property from the judgment-debtor. With all deference

(1) I.L.R., 12 Mad., 316.

(2) I.L.R., 17 Mad., 89 at p. 91.

to Mr. Justice Muttusami Ayyar, we think it is misleading to say that a simple mortgagee has a power of sale. The right to sue for sale which the mortgagee possesses is very different from a power of sale as that term is generally understood. But, however that may be, it was not any right of the mortgagee that was enforced. It was the decree-holder who was enforcing his remedy *in invitum* against the judgment-debtor, that judgment-debtor happening to be a mortgagee.

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We refer to a Full Bench the question whether a purchaser at a sale in execution of a decree against a mortgagee is a purchaser of the mortgaged property from the mortgagee within the meaning of article 134 of the second schedule to the Limitation Act?

The above reference came on before the Full Bench constituted as above.

J. L. Rosario, for appellant, contended that the auction-purchaser (defendant No. 19) was a purchaser from the mortgagee, within the meaning of article 134 of the Limitation Act, and that the suit was barred as against him, as more than twelve years had elapsed, before the filing of the suit, since the date of the purchase, namely 18th January 1880. He referred to rule 4 of the High Court Rules of Practice, Appellate Side, under which a judgment-debtor may be examined as to his interest in property; also to *Kali Das Mullick v. Kanhya Lal Pundit*(1); *Muthu v. Kambalinga*(2); *Ambalavana Desigar v. Bappu Rao Jagadap*(3); *Pandu v. Vithu*(4); *Chintamani Mahapatro v. Sarup Se*(5).

Sundara Ayyar, for respondent, contended that the suit was one for redemption and that defendant No. 19 had only the rights of the mortgagee from whom he had purchased; and that article 148 was applicable and that in consequence the suit was not barred. He cited *Bhagwan Sahai v. Bhagwan Din*(6); *Pandu v. Vithu*(4); *Sundara Gopalan v. Venkatararada Ayyangar*(7); *Dorab Ally Khan v. Abdool Azees*(8); *Whitworth v. Gaugain*(9);

(1) L.R., 11 I.A., 218; I.L.R., 11 Calc., 121.

(2) I.L.R., 12 Mad., 316.

(3) Appeal No. 129 of 1898 (unreported).

(4) I.L.R., 19 Bom., 140 at p. 144.

(5) I.L.R., 15 Calc., 703.

(6) I.L.R., 9 All., 97 at p. 103.

(7) I.L.R., 17 Mad., 228.

(8) L.R., 5 I.A., 116; I.L.R., 3 Calc., 806.

(9) 3 Hare, 416; on appeal, 1 Ph., 728.

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Sobhagehand Gulabchand v Bharchand(1); and *Radanath Doss v. Gisborne*(2)

The Court recorded the following

OPINION —We are clearly of opinion that when in execution of a money-decree immovable property of a judgment-debtor, in which his real interest is only that of a mortgagee, is attached and brought to sale, the auction-purchaser cannot be regarded as a purchaser from the mortgagee within the meaning of article 134 of the second schedule of the Limitation Act, even though the property was sold as the property of the judgment-debtor without any limitation of his interest therein. Article 134 is, in our opinion, intended solely to apply to cases in which the mortgagee disposes of the property voluntarily. But in the case of an involuntary sale in execution of a decree the purchaser cannot be regarded as a purchaser from the judgment-debtor. The decision in *Muthu v. Kambalinga*(3) proceeds, we think, on the erroneous assumption that the Court in selling the judgment-debtor's property in which his interest is that of a mortgagee for the discharge of the debt due by him under the decree is exercising the power of sale which the judgment-debtor *qua* mortgagee possesses. Assuming he has such power of sale, the Court may be regarded as exercising that power in a suit which the mortgagee may bring against the mortgagor for the recovery of the mortgage debt. Such power of sale cannot be exercised for the benefit of the mortgagee to enable him to discharge a debt due by him to a third party.

The case came on for final hearing before DAVIES and BHASHYAM AYYANGAR, JJ., when their Lordships delivered the following

JUDGMENT.—Following the decision of the Full Bench on the question referred to it, this second appeal is dismissed with costs.

(1) I.L.R., 6 Bom., 193 at p 202

(2) 14 M.I.A., 1 at pp 14, 16.

(3) I.L.R., 12 Mad., 316.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Arnold White, Chief Justice, Mr. Justice Benson,
and Mr. Justice Bhashyam Ayyangar.*

SAVARIMUTHU AND OTHERS (PLAINTIFFS),

1901.
October 7,
8, 17.

v

AITHURUSU ROWTHAR (DEFENDANT).*

Provincial Small Cause Courts Act—Act IX of 1887, sched II, art 31—Jurisdiction—Dispossession of plaintiff from immovable property by defendant under decree—Receipt by defendant of profits—Decree reversed on appeal—Suit by plaintiff to recover profits wrongfully received by defendant while in possession—Suit not cognizable by Small Cause Court

* Defendant obtained a decree against plaintiff for possession of certain immovable property, in execution of which defendant took possession of the property. Plaintiff appealed against the decree, which was reversed. While defendant was in possession he received profits from the property amounting to a sum less than Rs. 500. Plaintiff now sued in the Court of Small Causes to recover this sum as profits which had been wrongfully received by defendant.

Held, that the suit was not cognizable by a Court of Small Causes.

Subba Rao v Sitaramayya, (I L R, 21 Mad, 118), *Seshagiri Ayyar v Marakathammal*, (I L R, 22 Mad, 196), and *Kunjo Behary Singh v Madhub Chundra Ghose*, (I L R, 23 Calc., 884), considered.

Suit for profits alleged to have been wrongfully received by defendant whilst he was in possession of immovable property belonging to plaintiff. Defendant had dispossessed plaintiff in execution of a decree which had been afterwards set aside on appeal. Plaintiff now sued to recover the profits received by defendant whilst the latter had been in possession. These amounted to Rs. 412-8-0. Plaintiff presented his plaint on the small cause side of the Court of a Subordinate Judge. The question before the High Court was whether such a suit was cognizable by a Court of Small Causes.

The case, stated by the District Judge of Tinnevely under section 646-B of the Code of Civil Procedure, first came on for hearing before DAVIES and BHASHYAM AYYANGAR, JJ, who made the following

ORDER OF REFERENCE TO THE FULL BENCH.—The plaintiff having been dispossessed by a decree of Court in favour of the

* Referred Case No 10 of 1901, stated under section 646-B of the Civil Procedure Code, by the District Judge of Tinnevely, in Small Cause Suit No. 143 of 1899, on the file of the Subordinate Judge's Court of Tinnevely.

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defendant, afterwards set aside on appeal, and having recovered possession in pursuance of the appellate decree, sues the defendant for profits 'wrongfully' received by him, estimated at Rs 412-8-0, for a period of three years during which the defendant was in possession. The plaint was presented to the Subordinate Judge of Tinnevely on the small cause side of his Court, but was returned to be presented to the proper Court on the ground that the suit was not cognizable by a Court of Small Causes. The plaint was accordingly presented to the Additional District Munsif of Tinnevely, who, differing from the view taken by the Subordinate Judge, returned the plaint, holding that the suit was cognizable by a Court of Small Causes. When the plaint was re-presented to the Subordinate Judge he adhered to his former opinion and declined to receive it. The District Judge of Tinnevely, under section 646-B of the Civil Procedure Code, submits the record of the case to the High Court for its orders, on the ground that the Subordinate Judge's Court of Tinnevely failed to exercise a jurisdiction vested in it by law.

In our opinion, the suit is one of the nature described in article 109 of the Limitation Act and the concluding portion of article 31 in the second schedule to the Provincial Small Cause Courts Act (1887) and but for the decision of this Court in *Subba Rao v. Sitaramayya*(1) following a previous decision in *Seshagiri Ayyar v. Marakathammal*(2), which followed the decision of a Full Bench of the Calcutta High Court in *Kunjo Behary Singh v. Madhub Chundra Ghose*(3), we should have no hesitation in holding that the suit is excepted from the cognizance of a Court of Small Causes, under the concluding portion of article 31 of the second schedule. We find that the same view is taken in a recent decision of the Bombay High Court in *Antone v. Mahadev Anant*(4), and we fully concur in that decision and in the dissenting judgments of Ghose and Bannerji, JJ., in the Calcutta Full Bench case above referred to.

Article 109 of the Limitation Act has always been held to apply to a claim for mesne profits, whether the measure of mesne profits be, at the option of the plaintiff, the actual profits which the person in wrongful possession received or the profits which

(1) I.L.R., 24 Mad., 118.

(2) I.L.R., 22 Mad., 196.

(3) I.L.R., 23 Calc., 884.

(4) I.L.R., 25 Bom., 85.

he might, with ordinary diligence, have received. No doubt, as held by the Full Bench of the Calcutta High Court, a suit for mesne profits is not technically a suit for an account, though when the mesne profits claimed is the amount of profits actually received by the person in wrongful possession an account will invariably have to be taken and even when the claim is for profits which might have been received with ordinary diligence, an account, in a certain sense, will have to be taken to ascertain the same. Their Lordships of the Privy Council in *Dakshina Mohun Roy Chowdhry v. Saroda Mohun Roy Chowdhry*(1) describe as follows the legal position of a person, who, like the defendant in the present case, was in possession of landed property under a decree of court reversed on appeal (at page 163):—"Now it seems to their Lordships to be common justice, that when a proprietor in good faith, pending litigation, makes the necessary payments for the preservation of the estate, in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents. Of course he is bound to account for mesne profits, for all rents and profits which he has received or which without wilful default he might have received. But if, owing to circumstances beyond his control and still more if, on account of some wrongful conduct on the part of his opponent, he has received less than what he has had to pay for the preservation of the estate, it would seem to be in accordance with justice, equity and good conscience—there being no specific rule to the contrary—that he should recover the difference on the final adjustment of accounts."

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The second schedule to the Provincial Small Cause Courts Act, after excepting from the cognizance of a Court of Small Causes, in clauses 29 and 30, certain specific suits for an account, also excepts by the first part of article 31, "every other suit for an account"; but as a suit by a mortgagor to recover surplus collections received by the mortgagee after the mortgage has been satisfied (article 105 of the Limitation Act) and a suit for mesne profits (article 109) are not technically suits for an account, and would not therefore be comprehended in the expression "any other

(1) L.R., 20 I.A., 160 at p. 163; I.L.R., 21 Calc., 142.

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suit for an account," the Legislature advisedly included these two classes of suits under article 31, so that they may be specifically excepted from the cognizance of a Court of Small Causes. As these two classes of suits are akin to suits for an account, though not technically such, they were not inappropriately included in article 31 instead of being provided for by a separate article.

The decision of the Calcutta High Court, which was followed by this Court in the two cases above referred to, practically ignores the exception made by article 31 in regard to suits for profits of immoveable property. A suit for mesne profits can be regarded as technically a "suit for an account" only in rare cases—if at all in any case—and if the concluding portion of article 31 is intended to comprehend such rare cases, if any, the inclusion of it specifically in article 31 would be quite superfluous.

As claims to mesne profits directly involve title to immoveable property and not incidentally, though necessarily, as in the class of cases contemplated by section 23 of the Provincial Small Cause Courts Act, it appears to us that the Legislature has properly excepted suits for mesne profits from the cognizance of Courts of Small Causes.

We may in conclusion point out that suits of the character described in article 39 of the Limitation Act for compensation or damages for trespass on immoveable property are not excepted from the cognizance of Courts of Small Causes (see *Annamalai v. Subramanyan*(1) and *Lingayya Ayyavaru v. Mallikarjuna Ayyavaru*(2) reported in the footnote to the decision of this Court in *Seshagiri Ayyar v. Marokathammal*(3) above referred to).

We therefore refer the following question to a Full Bench:—

"Whether a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant who dispossessed the plaintiff in execution of a decree afterwards set aside on appeal, is cognizable by a Court of Small Causes, when the amount claimed does not exceed Rs. 500."

The case came on for hearing in due course before the Full Bench constituted as above.

Seshagiri Ayyar for defendant:—It is submitted that this suit is not cognizable by a Court of Small Causes. The defendant

(1) I L R, 15 Mad., 298.

(2) I L R, 22 Mad., 197—Footnote.

(3) I L R, 22 Mad., 196.

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obtained, a decree in Original Suit No. 285 of 1893 for possession of certain immoveable property, in execution of which defendant took possession of the property from plaintiff on 12th November 1894. Plaintiff appealed and the Munsif's decree was reversed, and the suit dismissed. Defendant had been in possession under the Munsif's decree from 12th November 1894 until 30th August 1897, and plaintiff now claims the profits received by defendant, amounting to Rs 412-8-0, during that period and brings his suit in the Court of Small Causes. The question is whether such a suit is excepted from the jurisdiction of the Small Cause Court by article 31 of schedule II of the Provincial Small Cause Courts Act. It appears to fall within the last words of article 31. Clauses (b) and (c) of article 29 relate to suits for accounts of certain specified kinds. Article 30 relates to another suit for an account of a particular nature. Article 31 relates to "any other suit for an account . . . including a suit . . . for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant." Article 109 of the Limitation Act contains similar wording. In *Kunjo Behary Singh v. Madhub Chandra Ghose*(1) it was held that all suits for mesne profits are suits for damages for trespass on real property. It is suggested that the Legislature, in order to avoid difficulty, has used the language of article 109 of the Limitation Act [He referred to *Dakshina Mohun Roy Chowdhry v. Saroda Mohun Roy Chowdhry*(2) and *Gursh Chunder Lahiri v. Shoshi Shukhareswar Roy*(3)].

Plaintiff was not represented.

The Court expressed the following

OPINION.—We are of opinion that a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant who dispossessed the plaintiff in execution of a decree afterwards set aside on appeal is not cognizable by a Court of Small Causes.

1) I L R, 23 Calc., 884 (2) L R, 20 I A, 160 at p 163, I L R, 21 Calc, 142.
(3) L R, 27 I A, 110; I L R., 27 Calc, 951.

APPELLATE CIVIL.

*Before Sir Arnold White, Chief Justice, and
Mr. Justice Bhashyam Ayyangar.*

1901.
March 13.
September
23

DORASAMI AND OTHERS (DEFENDANTS NOS. 1, 3 AND 4), APPELLANTS,

v

VENKATASESHAYYAR AND OTHERS (PLAINTIFF AND
DEFENDANTS NOS. 2 AND 5), RESPONDENTS.*

*Transfer of Property Act—Act IV of 1882, ss. 85, 96, 97—Mortgagee holding two
mortgages over same property—Suit for sale based on earlier mortgage alone—
Maintainability*

In 1880, B executed a simple mortgage over certain lands in favour of A. In 1886, B mortgaged the same lands to A with possession. A now brought a suit on the earlier mortgage for sale of the mortgaged property subject to the later mortgage.

Held, that the suit could not be maintained. *Sundar Singh v. Bholu*. (I.L.R., 20 All, 322), referred to.

Suit for Rs. 220, being the balance due on a mortgage. On 20th December 1880, the father of the defendants executed a simple mortgage deed for Rs. 1,000 in favour of plaintiff. On 22nd December 1886, defendants and their father executed another mortgage deed for Rs. 1,500, also in plaintiff's favour. This was a mortgage with possession. The material terms of this deed were as follows:—It was described as a mortgage bond executed in favour of plaintiff and continued—"As we are unable to pay interest in respect of the hypothecation debt bond previously executed to you on 20th December 1880 by one of us, namely, . . . the head of our family, as the land No. 263 . . . out of the lands hypothecated as lands mentioned in said document, was sold at Court auction for the debt payable to Subbaraya Ayyar to whom it was previously hypothecated and as the income from the remaining hypotheca, namely, . . . is not sufficient to cover interest for our advantage you will yourself,

* Second Appeal No. 51 of 1900 against the decree of H. Moberly, Acting District Judge of Madura, in Appeal Suit No. 99 of 1899, reversing the decree of V. Narayanasami Ayyar, District Munsif of Madura, in Original Suit No. 714 of 1898.

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for Rs. 1,500 out of the principal and interest due up to date in respect of said hypothecation debt bond, cultivate the said lands for three years from the current year, enjoy all the produce in lieu of interest and pay the sirkar kist due therefor. On 30th Adi (August) of the fourth year, we will pay the said amount and redeem the lands. In default, you will surrender the lands in that year on the 30th Adi of which we pay the amount. If the said lands were dug and repaired and if the village-cess were paid we will pay them also." The plaintiff alleged that defendants had represented their inability to pay interest on the earlier mortgage and had requested plaintiff to take an otti for Rs. 1,500 out of the amount of Rs. 1,720 due on the earlier bond, and had agreed to pay plaintiff the balance of Rs. 220; and that accordingly the later deed of 22nd December 1886 was executed. The defendants pleaded that the arrangement was that the amount due on the earlier mortgage should be discharged, in full, by the later mortgage for Rs. 1,500 and that nothing remained due in respect of the earlier mortgage on which the suit was brought. This question was raised in the first issue: the second issue was whether defendants had ever agreed to pay the balance of Rs. 220, as alleged, and the third, whether the claim was barred. The Munsif found that the earlier mortgage had been discharged by the execution of the later; and that defendants had not agreed to pay the balance of Rs. 220. He also held that the claim was not barred, by reason of the later mortgage of 22nd December 1886. He dismissed the suit. Plaintiff appealed to the District Judge who held that the Munsif had wrongly laid the burden of proof on the plaintiff, and remanded the suit for further evidence and a finding on the first issue. In accordance with this order the Munsif took additional evidence and returned a finding that the parties had agreed that the earlier mortgage should be superseded by the later. The District Judge held that this agreement was not proved, and that in consequence, plaintiff was entitled to succeed. He passed a decree for Rs. 220, and ordered the mortgaged property to be sold if payment should not be made within three months.

Defendants Nos. 1, 3 and 4 preferred this second appeal, the eighth ground of appeal being:—"The plaintiff being a usufructuary mortgagee cannot in law maintain the suit which is for sale of the mortgaged property."

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The second appeal first came on for hearing before SHEPARD and BHASHYAM AYYANGAR, JJ, when the Court made the following

ORDER.—“Assuming that the original bond has not been discharged we think it is clear that the suit would not be barred by limitation, because in the subsequent document there is an acknowledgment that a debt was still due beyond the Rs. 1,500 for which the security was then taken

“The question whether the original bond was discharged was clearly raised by the first issue and there was a decision on that issue. It was therefore not competent to the District Judge, under section 566 of the Code of Civil Procedure, to frame a fresh issue and allow fresh evidence to be taken. We must ask the District Judge to return findings on the first and second issues, dealing with the matter as if no fresh issue had been framed and no additional evidence taken.”

In accordance with this order the District Judge returned findings. On the first issue he found that the earlier bond was not discharged by the execution of the later. On the second issue he found that there was an agreement to pay plaintiff Rs. 220.

The second appeal came on for hearing in due course before a Bench constituted as above.

S. Srinivasa Ayyangar for appellants.—The suit is not maintainable. It is a suit for sale of the mortgaged property subject to the second mortgage, plaintiff being both first and second mortgagee. He is bound to bring his suit on both mortgages and cannot sue on one alone. In the first place it is submitted that the transaction of 1880 only amounts to a hypothecation or charge and not to a mortgage. The transaction of 1886 is a mortgage. This being so section 99 of the Transfer of Property Act applies, the words “whether arising under the mortgage or not” including a money claim as well as a charge as distinguished from a mortgage. But a suit for sale can only be brought on a mortgage; and the use of the words “mortgage” and “mortgagee” show that a distinction is contemplated between a mortgage and a charge, and a mortgagee and a charge-holder. So, under section 67, a suit must be brought on the mortgage. Even assuming the transaction of 1880 to be not a mere hypothecation or charge but a simple mortgage, the principle of section 99 and the terms of that section

show that a holder of two mortgages over the same property can only bring his suit for sale, under section 67, on both mortgages and not on only one of them. If a second mortgage is held by some one other than the first mortgagee, the second mortgagee must be made a party, under section 85, and his rights will be adjudicated upon under section 97. He would ordinarily be impleaded as a defendant in a suit by the first mortgagee. But inasmuch as it is impossible for a party to be both plaintiff and defendant, in a suit like the present the second mortgagee must be plaintiff,—that is, he, as first mortgagee and second mortgagee, must base his suit on both mortgages. It cannot be contended that the mortgaged property in a suit for sale on the first mortgage can be sold free of the second mortgage. This may be done where the second mortgage is held by a third person and the latter is given time to redeem. But here it is the plaintiff himself who has to redeem, and he cannot take advantage of his own default. Where the plaintiff holds the second mortgage he should be compelled to redeem; that is, he should sell under both of the mortgages and should therefore sue under both. It has been held that the holder of two mortgages over the same property may sue on the second, subject to the first, and the Allahabad Court has held the contrary. But it is immaterial to the present case which view is correct, because the present suit is on the first mortgage, subject to the second. Section 61, by which a mortgagor may, in the absence of a contract to the contrary, redeem one mortgage without paying any money due under a separate mortgage on other property, seems to show that the holder of two mortgages on the same property should not be permitted to sue on the second alone. In fact, where a decree is obtained for sale in a suit on a first mortgage alone, the plaintiff also holding a second mortgage, the effect of section 61 is that the right to redeem, given under the decree to the mortgagor should be a right only to redeem both mortgages, failing which sale should be directed. As the holder of two mortgages should not be permitted to sue for sale on his first mortgage and sell the mortgaged property subject to his second mortgage, so he should not be allowed to seek, in a suit on the first mortgage, to sell the property free of the second. The latter course would result in his reaping all the advantages of a suit on both mortgages without suing on both, because he would, under section 97, get the second mortgage satisfied out of the

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surplus sale proceeds. Another point is that the second mortgage in this case is usufructuary and, if rightly construed, contains no personal covenant. No doubt a suit lies under the first mortgage, but, under section 67, the mortgagee is only entitled to sue for foreclosure or sale in the absence of a contract to the contrary. It is submitted that the taking of a subsequent usufructuary mortgage without a covenant to pay amounts to a "contract to the contrary" within the meaning of this section, and that in consequence the right to sue for sale under the first mortgage has, by that contract, become curtailed, and the rights of the mortgagee must now be worked out under the usufructuary mortgage. The effect of the present suit as framed on the first mortgage alone is to deprive the mortgagor of his right to redeem, and this the mortgagee has no right to do. Sections 60, 88 and 89 show that the right to redeem cannot be thus taken away.

Sivasami Ayyar for respondents.—The ground now relied on has been taken for the first time in second appeal. Though the property may not be sold subject to the second mortgage, it can be sold free of it. Sections 96 and 97 recognize that where a holder of two mortgages sues on the first alone he waives his right of suit as regards the second, as he has a perfect right to do; and the result is that the sale will be free of the second mortgage. That fact is no bar to a suit upon the first. He cannot be compelled to sue on both if he is satisfied to sue on the first alone. The cause of action on the first is an independent one and he has a right to rely upon it. Whether a subsequent suit upon the second might be barred is a different matter and does not now arise. Where a mortgagor does not redeem the first mortgage he is not entitled to claim the right to redeem the second; but he would be if the contention of the appellant is correct. The result would be to cause hardship. Cases may be suggested, by way of illustration, —such as where the second mortgage has not yet become due, or where there is a right of sale under the deed for unpaid interest, before the principal has become due, or where the mortgage money is payable by instalments. Sections 61 and 99 do not support the appellant's contention and no authority is cited. If necessary the plaint may be amended.

S. Srinivasa Ayyangar, in reply, contended that he was entitled to raise the point as being one of law arising out of admitted facts and as showing that there was no cause of action.

JUDGMENT.—The revised findings submitted by the District Judge, in accordance with the order of this Court, dated 13th March 1901, must be accepted, as they are not open to any legal objection; and the case has now to be decided with reference to the question of law raised in the eighth ground which has now been argued. That question is whether the plaintiff, who claims to have two mortgages on one and the same property, can maintain a suit, on the first mortgage alone, for sale of the mortgaged property, such sale being subject to the subsequent mortgage in his own favour.

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The first mortgage, dated 20th December 1880, is a simple mortgage and the balance alleged to be due thereupon is Rs. 220. On the 22nd October 1886 the lands comprised in the simple mortgage, were mortgaged to the plaintiff, with possession, for the sum of Rs. 1,500, and the plaintiff was to enjoy the usufruct in lieu of interest; and there is a covenant in the mortgage bond for re-payment of Rs. 1,500 and redemption of the mortgaged properties, in August 1890.

In this suit, which was brought in 1898, the plaintiff does not allege that the amount of Rs. 1,500, which, under the usufructuary mortgage bond, became due in August 1890, has been paid to or recovered by him. He still continues to be in possession of the mortgaged property and if under the decree passed in his favour by the lower Appellate Court, the property is to be sold subject to his own usufructuary mortgage, the result will be that the plaintiff's right to redeem the usufructuary mortgage will be extinguished.

We are clearly of opinion, that a mortgagee cannot be permitted to sue for enforcing only one of the mortgages in his favour and obtain an order for sale, subject to other mortgages of the same property in his own favour—especially when they are subsequent to the mortgage sued upon. If the other mortgages had been in favour of third parties, it would have been necessary for them to be made parties to the suit under section 85 of the Transfer of Property Act; and when so made parties, their rights and interests would have been comprised and adjudicated upon, in the suit. It therefore follows that when the other mortgages are in his own favour, the right arising therefrom should also be comprised in the suit and adjudicated upon; and he cannot be permitted to obtain an order for sale, in a suit brought on only

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one of his mortgages, leaving the determination, of the existence or otherwise, of other mortgages and charges in his own favour, and of the extent and validity thereof, for future suits, between himself, the mortgagor and purchasers of the mortgaged property in such sale.

Under section 96 of the Transfer of Property Act, a sale of property in execution of a mortgage decree may, with the consent of the prior mortgagee, be made free from that prior mortgage, and in that case the prior mortgagee has the same interest in the proceeds of the sale as he had in the property sold. This clearly shows that in the absence of the consent of the prior mortgagee, the sale under a decree obtained by a puisne mortgagee, will be one subject to the incumbrance in favour of the prior mortgagee. It is unnecessary to decide in this case, whether, when the prior mortgage is in his own favour, he can bring the property to sale subject to such prior mortgage. But a sale under a mortgage decree cannot be made subject to a puisne mortgage, whether the same be in favour of a third party or of the decree-holder himself. This is placed beyond all doubt by the provisions of section 97 of the Transfer of Property Act as well as section 295, clause (c) '*thirdly*', of the Code of Civil Procedure. The principle of the Transfer of Property Act is that any person instituting a suit for foreclosure, sale or redemption of mortgaged property should include in that suit the interests of all persons, in such property, of which he has notice,—whether such interest be prior or subsequent to his own, and if he obtains an order for sale, the sale will not be made subject to subsequent incumbrances, and the sale proceeds, after deducting therefrom the expenses incident to the sale, will be distributed between himself and the subsequent incumbrancers, according to their priorities. [Vide Transfer of Property Act, section 97, '*fourthly*' and '*lastly*;' Civil Procedure Code, section 295, clause (c) ('*secondly* and '*thirdly*').]

In the hands of the purchaser, however, the property will be subject to prior mortgages, unless the sale has been made free from the same with the consent of the prior mortgagees, in which case, they acquire the right of priority over the sale proceeds (Transfer of Property Act, section 97—, '*secondly*').

If, however, a person having an interest in the mortgage property is not made a party to the suit, by reason of the party suing having no notice of such interest, the rights of such person will

remain unaffected by the decree and the proceedings in execution thereof, and complicated questions frequently arise when such person sues subsequently, upon his mortgage.

But a party suing upon one of his mortgages, can have no excuse for his not including in the suit his rights under his other mortgages, for he must necessarily have notice of the same.

The very form of a decree for sale, (No. 128, schedule 4 to the Civil Procedure Code) in a suit by a mortgagee—viz., that “upon the defendant (mortgagor) paying into Court, what shall be certified to be due to the plaintiff, (mortgagee), for principal and interest . . . together with costs . . . within six months . . . it is ordered that the plaintiff do re-convey the said mortgaged premises, free and clear from all incumbrances done by him . . . and do deliver up to the defendant . . . all documents in his custody or power relating thereto, &c.,” clearly shows that the mortgagee is not to reserve to himself rights over the mortgaged property which he re-conveys to the mortgagor “with all the documents in his custody or power relating” to the mortgaged premises. The said form is also in conformity with the substantive provisions enacted in sections 86 and 88 of the Transfer of Property Act.

Section 61 of the Transfer of Property Act, which is the same as section 17 of the “Conveyancing and Law of Property Act, 1881” (44 & 45 Vict., cap. 41), no doubt abolishes the doctrine of “consolidation of mortgages” over different properties, which doctrine was recognized by the Courts in India, before the Act was passed (*Vithal Mahadev v. Daud Muhammad Husen*(1)). But that very section implies, as is shown by the illustration, that if the different mortgages are in favour of one and the same person, not in respect of different properties, but over the same property, the mortgagor cannot seek to redeem any one mortgage without redeeming the additional mortgages also. The same principle will be equally applicable to a mortgagee, having several mortgages over the same property, seeking to obtain an order for sale on one mortgage only.

In *Sundar Singh v. Bholu*(2) which was heard by a Full Bench, the point actually decided was that section 43 of the Code of Civil Procedure and section 85 of the Transfer of Property Act, do not

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(1) 6 Bom. H.C.R., (A.C.), 90.

(2) I.L.R., 20 All., 322.

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preclude a mortgagee (who had obtained a decree for sale of the mortgaged property in a suit brought by him, against the mortgagor only, on a mortgage bond executed in his favour in 1878), from instituting a second suit on a bond mortgaging the same property in 1882 in favour of a third party, who had assigned the mortgage to the plaintiff in 1883 before he instituted the former suit on the mortgage bond of 1878. In that case, no objection was taken by the mortgagor to the maintainability of the first suit, and in fact, no allusion whatever was made in that suit to the existence of the second mortgage; and a decree for sale was passed under section 88 of the Transfer of Property Act. But the mortgagor resisted the second suit, pleading section 43, Civil Procedure Code, and section 85, Transfer of Property Act, as a bar to the same; but such plea though allowed by the Lower Courts was overruled by the High Court in second appeal. In the present case, objection is taken by the mortgagor to maintainability of the very first suit brought upon one of the mortgage bonds alone.

After disposing of the objections founded upon section 43, Civil Procedure Code, and section 85 of the Transfer of Property Act, the Full Bench of the Allahabad High Court, in the above case, observe as follows:—"There is nothing in the Civil Procedure Code or in the Transfer of Property Act, which prevents a holder of two independent mortgages over the same property, who is not restrained by any covenant, in either of them, from obtaining a decree for sale on each of them, in a separate suit It appears to us that their having obtained that decree can be no bar to their right to obtain a decree for sale on the mortgage of 1882. What benefit the two decrees will be to the plaintiffs it is difficult to see, except that the plaintiffs may execute one of these decrees by sale of the property, and, if there is a surplus arising from the sale, they may probably attach that surplus in execution of the other decree. One thing is quite clear, that the plaintiffs cannot sell the property twice over, and they cannot sell under the second decree subject to the first. That would be selling the equity of redemption, a right which is not acknowledged or recognized by the Transfer of Property Act and would be a mischief which has been struck at by section 99 of that Act. This Court in *Mata Din Kasodhan v. Kazim Huzain*(1), which

(1) I.L.R., 13 All., 432.

has been followed in many other cases, has recognized that the intention of the Legislature was to put an end to the abuses which existed before Act IV of 1882 came into force, and that there can be no sale of the equity of redemption apart from the property itself at the instance of the mortgagee "

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Whether the actual decision in the above case be right or wrong, we are unable to concur in some of the observations above quoted and in the soundness of the general dictum, that "there is nothing in the Civil Procedure Code, or in the Transfer of Property Act, which prevents a holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale, on each of them in a separate suit."

We may also add that the view which we take is in conformity with the principle underlying section 99 of the Transfer of Property Act, that the holder of a decree for money should not be permitted to bring to sale the property of the judgment-debtor, reserving a mortgage right thereon in favour of himself (the decree-holder).

The second appeal is therefore allowed with costs and the decree appealed against is reversed and that of the Munsif restored and affirmed, but on the ground that the suit as now brought does not lie. As this objection to the maintainability of the suit was not taken by the appellant in either of the lower Courts each party will bear his own costs in both the lower Courts.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Moore.

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3, 4, 5, 24.

MUHAMMAD MOHIDIN SAIT (PLAINTIFF), APPELLANT,

v.

THE MUNICIPAL COMMISSIONERS FOR THE CITY OF
MADRAS (DEFENDANTS), RESPONDENTS.*

Nuisance—Opening of burial and burning ground—"Convenient and fitting place"—Smoke from burning ground—Actionable nuisance—Public body—Protection—City of Madras Municipal Act (Madras)—Act I of 1884, ss. 392, 433, 458—Limitation—Continuing nuisance.

By section 392 of the City of Madras Municipal Act, 1884, the Municipal Commissioners "shall . . . provide a sufficient number of convenient and fitting places for burial and burning grounds, either within or without the limits of the city and may acquire land for this purpose;" and section 458 gives a right of action to any person aggrieved by the failure of the Commissioners to perform a duty imposed on them by the Act. Plaintiff was the owner of a bungalow, factory and garden in the neighbourhood of Madras. In 1896 the defendants, the Municipal Commissioners for the City of Madras, acquired land close to plaintiff's and opened a burial and burning ground thereon. Plaintiff alleged that his premises had, in consequence thereof, become unhealthy, insalubrious, and unfit for residential purposes, that he had been unable to work his factory, and that his property had deteriorated in value. He accordingly sued for an injunction restraining the defendants from using the land acquired by them as a burial and burning ground, and for damages. No negligence was alleged or shown regarding the manner in which the burial ground had been used. There was some evidence that the burning ground was to some extent a source of nuisance to any one who occupied plaintiff's premises, and that the market value of the premises had been depreciated by the opening of the burial ground:

Held, that no actionable nuisance had been proved.

Per Sir ARNOLD WHITE, C.J.—Even if an actionable nuisance had been proved, the defendants were protected.

London and Brighton Railway Co. v. Truman, (L.R., 11 App. Cas., 45), followed; *Metropolitan Asylum District v. Hill*, (L.R., 6 App. Cas., 193), distinguished.

The mere fact that a neighbouring landowner has sustained damage from the establishment of a burning and burial ground does not show that the site selected is not "convenient and fitting."

The words "within or without the limits of the City" must be read *secundum subjectam materiam* and with reference to the requirements of the community in connection with the disposal of corpses and the general necessities of the case.

* Original Side Appeal No. 31 of 1900 against the decree of Mr. Justice Boddam in Civil Suit No. 100 of 1900.

By section 433 of the City of Madras Municipal Act, the period of limitation for the commencement of suits against the Commissioners in respect of anything done in pursuance of the powers given by the Act is fixed at six months.

Semble, that plaintiff's cause of action, if any, arose when the site began to be used as a burial ground, namely in 1896, and that the claim was barred by limitation, both under section 433 and the general law.

Suit for an injunction and damages. The plaint was as follows:—

"1. The plaintiff is the owner of a bungalow, factory, garden and ground Nos. 50 and 51 in Suryanarayana Chetti Street, Tondiarpet, within the local limits of Madras. 2. The defendants are the owners of a plot of ground to the east of the plaintiff's said premises, the said plot of ground being separated from the plaintiff's said premises by a street about 24 feet in breadth. 3. That the plaintiff used to reside in the said bungalow and to lease the same to tenants. 4. That the plaintiff used the said premises also for the purposes of carrying on the business of drying and dressing tanned skins and hides and used also to lease the same to tenants for the same purpose. 5. That sometime in the year 1894 the defendants, notwithstanding the protests made for and on behalf of the plaintiff and the other inhabitants against their so doing, acquired the said plot of ground for the purpose of converting the same into a burning and burial ground for Hindus, and sometime in the year 1896 the defendants began to use the said plot of ground as a burning and burial ground for Hindus having at the same time closed a burial and burning ground situate in Shaik Maistri's Street, Tondiarpet, Madras. 6. That sometime in the year 1899 the defendants closed the burning and burial ground for Hindus which had theretofore existed in new Washermanpet about a mile to the north of the said plot of ground, in consequence of which the said plot of ground became the only place resorted to in that locality by the inhabitants for the purposes of burning or burying the dead. 7. That, in consequence of the said plot of ground being used as a burning and burial ground for Hindus, the plaintiff's said premises have become unhealthy and insanitary and unfit for residential purposes and the tenants of the plaintiff's said premises have quitted the said premises. 8. That, in consequence of the said plot of ground being used as aforesaid, the plaintiff has been unable to work the said factory for drying and dressing tanned skins and hides. 9. That, by reason of the said plot of ground being used as aforesaid, the value of the said property has been deteriorated

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to the extent of Rs. 12,000 and the plaintiff has sustained loss in the shape of rent at the rate of Rs. 80 per mensem for the past three years amounting to Rs. 2,880 10. The plaintiff charges that, by the opening of the said burning and burial ground and the closing of the old burning and burial ground, the defendants have become liable to the plaintiff for the payment of the said sums of Rs. 12,000 and Rs. 2,880, making together the sum of Rs. 14,880 by way of damages for the loss sustained by the plaintiff as aforesaid. 11. That in or about the 14th day of February 1900 the plaintiff through his attorneys gave notice to the defendants of the particulars of his claim, but the defendants have not replied to the same. The plaintiff therefore prays judgment:—(a) That the defendants may be refrained by injunction from continuing to use the said plot of ground as a burning and burial ground. (b) That the defendants may be decreed to pay to the plaintiff the said sum of Rs. 14,880. (c) For such further or other relief as to this Honourable Court shall seem meet and the nature of the case may require.”

The written statement of the defendants was as follows :—“ 1. By notification No. 310 published in the Fort Saint George Gazette of 29th May 1894 His Excellency the Governor in Council declared and duly notified under Act I of 1894 (The Land Acquisition Act, 1894) that the land referred to in paragraph 2 of the plaint was needed for a public purpose, to wit for use as a Hindu burial and burning ground, and the said land was acquired under the provisions of the said Act. 2. The said land, in the opinion of the defendants, and in fact, is a convenient and fitting place for a burial and burning ground and was acquired and provided by the defendants for that purpose with the sanction of the Governor in Council under section 392 of the City of Madras Municipal Act. 3. The said land was duly registered as a Hindu burial and burning ground on 14th December 1894 and the first burial took place there on 25th August 1896, the burial and burning ground in Shaik Maistri's Street, Tondiarpet, having been previously closed under section 388 of the said Municipal Act. 4. The burial and burning ground at the new Washermanpet referred to in paragraph 6 of the plaint was closed in September 1898 under the last mentioned section. 5. The said burial and burning ground in the second paragraph hereof mentioned is not maintained by the defendants for profit but is provided by them

in discharge of their duty under the said Act as a place where Hindus being under a social or legal obligation to do so may duly bury or burn corpses. The President of the Municipal Commission licenses the Vellyans, &c., under section 391 of the said Act, but does not otherwise employ them. 6. The defendants plead that the plaint discloses no cause of action against the defendants and that in any event the defendants are protected under the provisions of the said Acts and under the general law from any suit or claim for damages or an injunction in respect of their action concerning the said new burial and burning ground. 7. The defendants deny that any protest was made in respect of the acquisition of the said burial ground as is alleged in paragraph 5 of the plaint and say that no complaint was made by or on behalf of the plaintiff till 31st May 1899 and the plaintiff is precluded by his own acquiescence from maintaining the suit. 8. The defendants deny that owing to the said new burial and burning ground the premises mentioned in paragraph 1 of the plaint have become unhealthy, insanitary, or unfit for residential purposes or untenable for the purposes of a factory. 9. The defendants deny that the said premises have been deteriorated as alleged or that the plaintiff has sustained loss as alleged or that the plaintiff is entitled to the sum claimed or any sum by way of damages or any injunction as claimed. 10. Save as aforesaid the defendants put the plaintiff to the proof of the several allegations contained in the plaint. 11. The notice of suit is insufficient. 12. The cause of action if any is barred by limitation in whole or in part. 13. The defendants pray that this suit may be dismissed with costs."

The following issues were framed :—1 Whether the plaintiff is the owner of the property or has any interest in it entitling him to maintain the suit? 2. Whether the user of the defendants' land in the manner alleged in the plaint is a nuisance to the plaintiff and is as such actionable? 3. Whether the defendants are protected by any provision of the Land Acquisition Act or the Municipal Act? 4. Whether the plaintiff has, by his alleged acquiescence, become disentitled to an injunction? 5. Whether the suit is in whole or in part barred by limitation? 6. To what damages, if any, is the plaintiff entitled?

The evidence is summarized in the judgments of the Appellate Court.

Mr. W. Barton for the plaintiff.

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Mr *K. Brown* and Mr *Allan Daly* for the defendants

The findings of the Court on the several issues were as follows :—"No 1. This is not contested but admitted by defendants. No 2. I hold as a matter of fact that it is not a nuisance to the plaintiff and that plaintiff has no cause of action within six months of his notice of action. No 3. There is no provision that I know of in either one or the other of the acts except in the section which refers to limitation which protects the defendants. No 4. If it were necessary to decide that I should have no hesitation in deciding that in the affirmative. No 5. The whole suit is in my judgment barred by limitation. No 6. The suit should be dismissed, in my opinion, with costs.

The suit was accordingly dismissed

Plaintiff preferred this appeal.

Mr *W. Barton* for appellant.—It is submitted that the user of defendants' land as alleged in the plaint is a nuisance to the plaintiff and is actionable [He dealt with the evidence and referred to sections 433, 392 and 237 of the City of Madras Municipal Act.] The site of the burial ground could have been selected elsewhere. By section 392 the municipality has to provide "convenient and fitting" places for burial grounds, and either within or without the limits of the city. This is not a "convenient and fitting" place, for it causes a nuisance to an owner of adjacent property. The discretion given by the section has not been properly exercised. There was no irregularity in what was done, but such a site was selected that a nuisance was the necessary result. "Nuisance" is defined in section 3 (r) of the Municipal Act. By section 436 the Municipal Commissioners may make compensation to persons sustaining damage by reason of the exercise of any of the powers vested in them by the Act, and by section 458 any person aggrieved by the failure of the Commissioners to perform any duty so imposed may sue, and under section 455 the municipality is liable for damages. The smoke caused by the burning of corpses caused a nuisance: it "materially interferes with human comfort"—in the words used in *Crump v. Lambert*(1). The discretion given by section 392 must be exercised with due regard to the rights of private individuals. It would be otherwise if the municipality had no option and

(1) L.R., 3 Eq., 409.

were compelled to create a nuisance. See *Raymohun Bose v. E.I.R. Co* (1); *Sayad Jafir Sahab v. Sayad Kadir Rahiman* (2); *The Land Mortgage Bank of India v. Ahmedbhoy Habibbhoy* (3); *Janardana Shetti Gorumdarajan v. Badava Shetti Guni* (4); *Metropolitan Asylum District v. Hall* (5) In *London and Brighton Railway Co. v. Thuman* (6), the Act distinctly authorised the creation of a nuisance over a limited area, and consequently the Railway Company were not responsible. *Queen-Empress v. Saminadha Pillai* (7) was a case under the Criminal Procedure Code. It is submitted that an injunction should be granted to save multiplicity of suits. The notice given was sufficient. See *Municipality of Parola v. Lakshmandus* (8), decided under the Bombay Municipal Act. There has been no acquiescence here—acquiescence means something more than delay. [MOORE, J.—Plaintiff has stood by and let a costly site be acquired] See Kerr on 'Injunctions' and *Willmott v. Barber* (9).

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Mr. K. Brown and Mr. D. Channer for respondents. Mr. Brown:—Two points arise on the evidence—(1) as to the pollution of the water in the well; (2) as to the smoke caused by the burning of corpses. [He dealt with the evidence.] The plaintiff has failed to establish nuisance on either point. In any case the claim in respect of pollution of water must be barred, since corpses have admittedly been buried there for more than three years. The definition in section 3 (r) of the Municipal Act does not govern a claim of a nuisance at common law. What may be a nuisance is considered in Clerk and Lindsell on Torts, 1st edition, page 298, and the distinction is shown between a nuisance causing personal discomfort but not causing depreciation of property. Though *Queen-Empress v. Saminadha Pillai* (7) was a criminal case, for the present purpose the meaning of a nuisance under the Criminal Procedure Code may be taken to be the same as one at common law: that case shows that as cremation is the ordinary method here of disposing of corpses, residents must not be too fastidious. See also *Bamford v. Turnley* (10), there referred to, in

(1) 10 B.L.R., 241.

(3) 1 L.R., 5 Bom., 35

(5) L.R., 6 App. Cas., 193 at p. 212

(7) 1 L.R., 19 Mad., 464

(9) L.R., 15 Ch.D., 96 at p. 105.

(2) 1 L.R., 12 Bom., 634.

(4) 1 L.R., 23 Mad., 385 at p. 387.

(6) L.R., 11 App. Cas., 45.

(8) 1 L.R., 25 Bom., 142 at p. 149.

(10) 31 L.J., Q.B., 286.

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which Pollock, C. B., deals with what may be nuisances and the circumstances on which they depend, and the "compromises" that are necessary in social life; and as to what is a "convenient" place. In *Cavey v Ladbetter*(1), it was held that it would be a misdirection to the jury to direct them to consider solely the evidence adduced to show discomfort to the plaintiff and not to take into consideration any evidence showing that the act complained of was one of ownership on the part of the defendant which was clearly lawful if it did not cause actionable discomfort to a neighbour and that it was done with full intention to prevent discomfort in respect of time and place and manner and degree. That case also shows that conditions may vary and that there must be mutual adjustment in large centres. *Sturges v. Bridgman*(2) shows that "the circumstances must be taken into consideration as well as the act complained of," and that "what would be a nuisance in Belgrave Square would not necessarily be one in Bermondsey" There is no suggestion in the plaint that the burning ground has been used in a negligent or unreasonable manner. The case for plaintiff is that the acquisition and user of the land thus must cause a nuisance. But if *Queen-Empress v Saminadha Pillai*(3) is accepted no cause of action has been shown. In Mayne's 'Criminal Law,' page 556. some cases are summarised as to life in large cities. As to section 392, and the question whether the municipality has properly exercised its discretion, plaintiff is not entitled to raise it, as there is no charge in the plaint that the discretion has been wrongly exercised. If such a discretion has been properly exercised, the Courts cannot interfere *Nagar Valab Narsi v. The Municipality of Dhandhuka*(4); *The Municipal Commissioners for the City of Madras v. Parthasaradi*(5) (decided on the City of Madras Municipal Act of 1878). In *Duke of Bedford v. Dawson*(6), the Master of the Rolls holds that the object of that Act was to enable a building to be erected which interfered with the rights of a neighbouring proprietor: the case also deals with *Clark v. School Board for London*(7). In *Sutton v. Clarke*(8) Gibbs, J., deals with the position of a public body charged with a public duty, as

(1) 32 L.J., C.P., 104.

(3) I.L.R., 19 Mad., 464.

(5) I.L.R., 11 Mad., 341.

(7) I.L.R., 9 Ch. App., 120.

(2) L.R., 11 Ch.D., 852 at p. 865.

(4) I.L.R., 12 Bom., 490

(6) L.R., 20 Eq., 353 at p. 358.

(8) 6 Taunt., 29; 16 R.R., 563.

compared with that of a private individual. Section 392 of the City of Madras Municipal Act is imperative, and relates to one of the most imperative needs of a town : and by section 458, if the Commissioners fail to perform their duty they may be compelled to do it at the suit of any one, so this is an *a fortiori* case. Turner, L. J., in *Baddulph v. The Vestry of St. George, Hanover Square*(1) (a case under the Metropolis Management Act) lays down that the Court will consider whether there has been a *bonâ fide* exercise of the powers conferred by the Legislature before it will interfere. Section 455 does not preclude the municipality from pleading their Act, and only applies to other "persons." For example, see section 170 relating to toll-bars and gates. The erection of these on a public highway would be *primâ facie* a nuisance, and if section 455 refers to the municipality the latter would not be entitled to rely upon its act to justify such a nuisance. A similar illustration may be raised with regard to sections 212, 234, 258 and 292. In the statute on which *Metropolitan Asylum District v. Hill*(2) was decided, (namely, 30 Vict., cap. 6), there are no imperative words rendering the erection of asylums compulsory. By section 5, which governs that case "asylums may be provided,"—and section 6 also depends on a similar permissive authority. A burial ground is more imperatively necessary than a small-pox hospital. Section 319 of the City of Madras Municipal Act contains a provisional power to erect public latrines, "so as not to create a nuisance," but section 392 is imperative. See also sections 237 and 436 as to compensation. It is submitted that we are governed by *London and Brighton Railway Co. v. Truman*(3); and this is an *a fortiori* case under that decision, because there the railway company were under no obligation to provide cattle pens, and were not limited as to the locality in which they should establish them. [He referred to *Hammersmith, &c., Railway Co. v. Brand*(4).] *Canadian Pacific Railway v. Parke*(5) deals with the two cases—*Metropolitan Asylum District v. Hill*(2) and *London and Brighton Railway Co. v. Truman*(3)—and shows that where a Statute is permissive only, the Legislature cannot be taken to have contemplated a user regardless of the rights of others. [On the

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(1) 33 L.J., Ch., 411.

(3) L.R., 11 App. Cas., 45.

(5) [1899] A.C., 535.

(2) L.R., 6 App. Cas., 193.

(4) L.R., 4 H.L., 171.

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question of the sufficiency of notice he referred to *Municipality of Parola v Lakshmandas*(1) and *Hari Lal v Himat*(2), as decisions on the wording of the Bombay Act, which is different to the Madras Act. On the question of injunction he contended that *Willmott v. Barber*(3), is not the law in India and cited *Sarat Chunder Dey v. Gopal Chunder Laha*(4), in which *Vishnu v Krishnan*(5) is overruled; also section 56 of the Specific Relief Act; also, on the question of delay, *Lindsay Petroleum Company v. Hurd*(6). On the question of the burden of proof he referred to the declarations in cases of negligence in Bullen and Leake's 'Pleadings'; Beven on 'Negligence,' 2nd edition, page 391; *Wakehn v London and South Western Railway Co* (7); per Lord Watson at page 47; the Indian Evidence Act, section 103; and *Harrison v Southwark and Vauxhall Water Company*(8). He also referred to *Attorney-General v. Clerkenwell Vestry*(9)]

Mr W. Barton, in reply, referred to *Attorney-General v. Sheffuld Gas Consumers' Co* (10).

Their Lordships delivered the following judgments —

SIR ARNOLD WHITE, C.J.—In this case the plaintiff sued for an injunction to restrain the defendants (the Municipal Commissioners for the City of Madras) from continuing to use a certain plot of ground as a burning and burial ground, and he claimed damages for special injury which he alleged he had sustained by reason of the use of the ground in question as a burning and burial ground.

The first question for consideration is whether the evidence shows that the use of the ground as a burning and burial ground constitutes an actionable nuisance.

The second issue in the case is whether the user of the defendants' land in the manner alleged in the plaint is a nuisance to the plaintiff and is as such actionable? The finding of the learned Judge upon this issue was in the negative

In the Court below the plaintiff sought to make out that the water in his well had become polluted by reason of corpses having been buried in close proximity to his well, and that the smoke and

(1) I.L.R., 25 Bom., 142 at p. 149.

(3) L.R., 15 Ch D, 96

(5) I.L.R., 7 Mad., 3

(7) L.R., 12 App. Cas., 41 at p 47.

(9) [1891] 3 Ch., 527 at p. 536.

(2) I L R., 22 Bom., 634

(4) L.R., 19 I.A., 203, I L R., 20 Calc., 296.

(6) L.R., 5 P.C., 221 at p 240

(8) [1891] 2 Ch., 409 at p 412

(10) 3 De G. M. & G., 304.

smell from the burning corpses amounted to a nuisance and had caused his property to deteriorate in value.

With regard to the alleged pollution of water, the plaintiff stated that corpses have been buried within 40 feet of his well

The evidence, however, shows that the distance was some 70 feet. The plan shows about 69 feet and the plaintiff's witness, Major Robertson, put it at "within 75 feet." The plaintiff stated in general terms that the water had become polluted to his own knowledge. As he admittedly left the premises in June 1897 and as it was not suggested he had tested the water since that date, the pollution (if any) to which he spoke must have taken place before June 1897. So far as I can see, beyond a general statement that the water "got spoiled" the plaintiff nowhere states in his evidence that prior to 1897 the well water was pure. One of his witnesses, however, who spoke to the state of things in August 1896 says that at that date the water was good and was used for drinking and bathing. There is a sewage farm in the immediate neighbourhood which, the plaintiff stated, was extended in 1897, and brought within a furlong or a furlong and-a-half of his premises. The plaintiff also stated that the well water smelt of sewage, and one of his own witnesses, Mr Tamiar, said in cross-examination that the contamination of the water by the sewage of itself would make the premises uninhabitable even without considering the burial ground. Major Robertson who was called by the plaintiff as an expert witness gave evidence to the effect that the well received its water by percolation and that there were graves within the drainage area of the well. He put the drainage or catchment area at 100 feet—presumably a radius of 100 feet from the well. In cross-examination Major Robertson admitted that his examination only occupied him ten minutes or a quarter of an hour. He stated that the extent of the catchment area depended on the depth of the well and the nature of the soil. He stated that he did not measure the depth of the well but that he inferred that it was shallow and that the water percolated into it. He also stated that the surface of the land was sandy, that he did not examine to see how deep the sand went down, but that he inferred that it went down deep from what he saw. He also said that he did not think it would be possible to give a scientific opinion wholly from what he had seen. This was all the evidence with reference to the alleged pollution of the well, and on this

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evidence I have no hesitation in saying that, in my judgment, the plaintiff failed to prove that the well had become polluted by reason of corpses having been buried in its vicinity.

As regards the alleged nuisance by smoke and smell the evidence was that the nearest burning platform is about 160 yards distant from the plaintiff's premises. The plaintiff, so far as his personal knowledge was concerned, could only speak to the state of things from September 1896 to June 1897. He put the number of corpses which were burned in the course of the day "in ordinary times" as 4 to 8, and he said that when a sea-breeze blew the smoke was carried over his premises and blown through the windows of his bungalow. As a matter of fact, as proved by the evidence of Sir George Moore, the President of the Municipal Commission, there were 107 burnings in 1897, 135 in 1898 and 132 in 1899—*i. e.*, less than 3 a week. The plaintiff stated that he found it impossible to use the premises after 1897 as the smell was unbearable.

Sultan Mohidin (plaintiff's third witness) stated that a bad smell came from the burial and burning ground and that when the wind blew the smoke got into the bungalow. This witness had taken the premises for a short time on the condition that he should be allowed to give them up when the burial ground was opened and he left immediately after the opening of the ground. His objection to living in the neighbourhood of a burial and burning ground was a general one, and his evidence as to this particular ground being a nuisance is worth very little.

Muhammad Kasim, plaintiff's fourth witness, stated that he took the bungalow on a lease in May 1899 and went to live there with his family, that he remained there two weeks and then left as his children fell sick and a doctor had given him certain advice. This witness had known the property before he agreed to take the bungalow and up to the time of going to live there appears to have thought the house a suitable one for a holiday resort.

Mr. Mitchell (plaintiff's fifth witness) also knew the premises before he thought of occupying the bungalow. He stated that he took his wife there one evening, that there was a lot of smoke about and a rather offensive smell, that he was told it came from the cremation platform and that he then declined to take the house. With regard to this witness, it is to be observed that although he knew the place well (he said in his evidence "I frequently pass

on my beat and know the land thoroughly. . . . I know there was a burial and burning ground there which had been there for the last four years") he appears to have been desirous of becoming a tenant of the bungalow until the particular occasion to which he referred in his evidence.

Major Robertson also gave general evidence to the effect that the burning of the corpses would in time have an injurious effect on the health of persons living in the bungalow. He did not enter the burialground and his investigations must have been somewhat cursory as he put the distance of the cremation platforms from the plaintiff's premises at 75 to 100 yards—the actual distance being 160. He stated in cross-examination that the smoke of burning corpses at 100 yards would not be injurious but unpleasant—nauseating. It is clear that the plaintiff's claim for special damages is grossly exaggerated. His statement in the Court below was that he had spent Rs. 10,000 on the property. The learned Judge found this statement to be wholly untrue, and the plaintiff's counsel in this Court did not attempt to controvert this finding. There is, however, I think, some evidence to show that the market value of the premises has become depreciated by reason of the opening of the burial ground.

Now, no doubt, the use of property so as to cause substantial discomfort to neighbours by causing offensive smells, (*Bamford v. Turnley*(1)), or by producing large volumes of smoke, (*Crump v. Lambert*(2)), may give rise to an actionable nuisance, but, as it is put by Thesiger, L. J., in delivering the judgment of the Court of appeal in *Sturges v. Bridgman*(3), "Whether anything is a nuisance or not is a question to be determined not merely by an abstract consideration of the thing itself, but in reference to its circumstances; what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey."

In this connection it is to be observed that the plaintiff himself carried on business as a tanner and a sewage farm existed in the immediate neighbourhood. The plaintiff's witness Mr. Mitchell described the place as "rather an outlandish spot not much inhabited" and his witness Major Robertson described it as "a remote desolate place."

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(1) 31 L.J. Q.B., 286.

(2) L.R., 3 Eq., 409.

(3) L.R., 11 Ch. D., 852 at p. 865

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The general observations of Pollock, C. B., in his judgment in *Bamford v. Turnley*(1)—although the learned Judge differed from the majority of the Court upon the actual question under consideration—are no doubt, good law. He observed “most certainly, in my judgment, it cannot be laid down as a legal proposition or doctrine, that anything, which under any circumstances, lessens the comfort or endangers the health or safety of a neighbour, must necessarily be an actionable nuisance. That may be a nuisance in Grosvenor Square which would be none in Smithfield Market. That may be a nuisance at midday which would not be a nuisance at midnight. That may be a nuisance which is permanent and continual, which would be no nuisance if temporary or occasional only. A clock striking the hour, or a bell ringing for some domestic purpose, may be a nuisance if unreasonably loud and discordant, of which the jury alone must judge, but although not unreasonably loud, if the owner from some whim or caprice made the clock strike the hour every ten minutes, or the bell ring continually, I think that a jury would be justified in considering it to be a very great nuisance. In general, a kitchen chimney, suitable to the establishment to which it belonged, could not be deemed a nuisance; but if built in an inconvenient place or manner, on purpose to annoy the neighbours, it might, I think, very properly be treated as one. The compromises that belong to social life and upon which the peace and comfort of it mainly depend will furnish an indefinite number of examples in which some apparent natural right is invaded or some enjoyment abridged.” In determining whether the use of the burning ground amounts to an actionable nuisance I think we are bound to take into consideration the fact that the object of the burning ground is to provide a convenient and sanitary means of disposing of corpses in accordance with the general sentiment of the community. It has been held by this Court (*Queen-Empress v. Saminadha Pillai*(2)), that the use of a place dedicated for the communal purpose of cremation in a way not calculated to aggravate the inconveniences necessarily incident to such an act as it is generally performed in this country does not amount to a public nuisance within section 290 of the Penal Code on the ground that discomfort and annoyance are caused to persons near the place. The Judges remark:—

(1) 31 L.J., Q.B., 286 at p. 292.

(2) I.L.R., 19 Mad., 464.

"It is hardly necessary to observe that not only the religious sentiments of all sections of the community, but also the requirements of general health and comfort, absolutely demand that corpses shall be disposed of as early as practicable, so as not to prove hurtful to the living. It is this imperative necessity that, as a general rule, casts upon persons having charge of corpses not only as a matter of social, but also of legal obligation, the duty of arranging for the disposal of those corpses in a reasonably speedy, decent and inoffensive way. And to facilitate the discharge of such an important duty, it has been, as is well known, the general and immemorial custom to set apart some spots for use by the public as places of sepulture or cremation. The absolute necessity for some such common provision will become apparent on a moment's reflection. It is sufficient to refer to but one—not an unimportant—consideration bearing on the matter, viz., that the number of persons who are in a position to find for interment or cremation of the bodies of their deceased relations, friends or dependents, places of their own, which, while being convenient to those persons themselves, will not be a nuisance to others, is extremely small when compared with the millions of landless men and women who, if required to do so, would find it impossible to obtain such spots for similar use by them. Hence the existence of common burial and cremation grounds in almost every inhabited village in this Presidency. . . . And when persons, like the accused, entitled to use a particular spot dedicated for the communal purpose of cremation, use it for that purpose in a manner neither unusual nor calculated to aggravate the inconveniences necessarily incident to such an act as it is generally performed in this country, it must be admitted that he does what is perfectly lawful. To hold that an act so properly done, not only in the exercise of a right of which the people of this country are generally so very tenacious, but also in the discharge of a serious duty, amounts, as the prosecution contends, to an offence, would be highly unreasonable and unjust."

In the present case it is not alleged in the plaint and no attempt was made to prove that there has been or is anything negligent or unreasonable in the way in which the burial ground is used or in the methods adopted for the disposal of corpses. Applying the principles which underlie the decisions to which I have referred to the facts of the present case I am of opinion that the learned Judge's finding that no actionable nuisance has been proved is right.

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The question, however, whether—assuming a nuisance to have been proved—the defendants are protected has been fully argued and I propose to deal with it.

The defendants are the Municipal Commissioners for the City of Madras. Section 392 of the City of Madras Municipal Act imposes on the Commissioners the duty of providing burial or burning grounds. The section is in these terms:—"The Commissioners shall from time to time out of the Municipal fund, with the sanction of the Governor in Council, provide a sufficient number of convenient and fitting places for burial or burning grounds either within or without the limits of the city and may acquire land for this purpose" Section 458 in terms gives a right of action to any person aggrieved by the failure of the Commissioners to perform a duty imposed upon them by the Act

Sir George Moore, the President of the Commission since 1886, stated in his evidence that the place was chosen as the most suitable and convenient place for the community for whom it was necessary, and that in his judgment a more suitable place could not have been found. As has been already pointed out, the plaintiff's witness Mr. Mitchell described the place as "rather an outlandish spot not much inhabited" and his sixth witness Major Robertson described it as "a remote, desolate place." Sir George Moore stated that since 1887 it had been the policy of the Commissioners to take grave-yards out of the populous parts of the municipality irrespective of whether the grave-yards were overcrowded or not. He also stated that he had been over the plaintiff's premises probably every year since 1887 and that whenever he had seen the premises they had been uninhabited. He admitted that the cemetery might have been taken further north, the only objection to this being that it would be further from the people and not so convenient.

Now section 392 of the Act is imperative in its terms. The Commissioners are bound to provide burial and burning grounds somewhere, though they have no doubt to exercise a discretion in the selection of sites. As regards this part of the case the plaintiff's proposition of law appeared to be, although it is not formally raised in the pleadings, that the mere fact that he, a neighbouring landowner, has sustained damage shows that the place provided by the Commissioners as a burning and burial ground is not "convenient and fitting." I cannot assent to this

proposition. In his Judgment in *London and Brighton Railway Co. v. Truman*(1) Lord Blackburn cites the following passage from the judgment of North, J, in that case:—"In the present case it is pleaded that the company were guilty of negligence in selecting a place for their cattle-yard and pen which was not suitable for the purpose. The fact that a nuisance is proved to exist without any negligence in the mode of conducting the business there shows that the place is not suitable for the purpose" Lord Blackburn says he cannot agree with this.

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It was argued on behalf of the defendants that the discretion of the Commissioners in selecting a place as "convenient and fitting" cannot be questioned unless it could be shown that they exercised the so-called discretion capriciously or perversely and that a person who has sustained an injury which he would not have sustained if another site had been selected has no right of action. The decision of this Court in *The Municipal Commissioners for the City of Madras v. Parthasaradhi*(2) and that of the Bombay High Court in *Nagar Valab Narsi v The Municipality of Dhandhuka*(3) were cited in support of this view.

It is to be observed that the passage in the judgment of Sir George Jessel in *Duke of Bedford v. Dawson*(4) which was referred to by the learned counsel for the respondents in this connection had reference to an enactment which in general terms empowered a public body to take land and erect buildings thereon for a specified purpose. I am inclined to think that these observations of Sir George Jessel and the passage in the judgment of Lord Selborne to which he refers are not altogether reconcilable with the judgments of the House of Lords in the more recent cases to which I shall have to refer later.

It appears to me that these words 'convenient and fitting' neither help nor hinder the plaintiff. The same canons of construction and the same principles of law would be applicable if they found no place in the section and the section ran "the commissioners shall . . . provide . . . places for burial or burning grounds, &c."

Assuming the use of the burning ground constitutes a nuisance which would give a right of action if the defendants were not a statutory body who acted under statutory powers in opening the

(1) L R., 11 App. Cas., 45 at p. 64

(3) I.L.R., 12 Bom., 490.

(2) I.L.R., 11 Mad., 341.

(4) L R., 20 Eq., 353.

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burning ground, the question is — is the present case governed by the decision of the House of Lords in *Metropolitan Asylum District v. Hill*(1) and the cases which follow this decision or does it fall within the chain of authorities of which *London and Brighton Railway Co. v. Truman*(2) may be described as the leading case? In *Metropolitan Asylum District v. Hill*(1) the Statute authorised, but did not enjoin, the purchase of lands and the erection of buildings for the purposes of the Act. The defendants erected a small-pox hospital near the plaintiff's properties. The defendants were under no statutory obligation to erect a small-pox hospital anywhere. They were merely authorised to do so. In the case now before the Court the defendants are under a statutory obligation to provide burning and burial grounds which may be either within or without the limits of the city. One of the grounds on which the present case is distinguishable from the hospital case is that the duty to open burial grounds is mandatory or imperative whereas the enactment in question in the small-pox hospital case merely authorised the erection of hospitals. The present case may also be distinguished on the ground that the Legislature in the present case clearly contemplated and authorised some interference with private rights of property since section 392 empowers the Commissioners to acquire land compulsorily for the purpose of burning grounds. In the hospital case the Statute gave no power to acquire land compulsorily. The recent decision of the Privy Council (*Canadian Pacific Railway v. Parke*(3)) in which the decision in *Metropolitan Asylum District v. Hill*(1) was followed also went upon the ground that the authority given to do the act which resulted in injury to a third party was permissive and not imperative.

Again, in the hospital case, the statute made no provision for compensation to injured parties, and in the Privy Council case just referred to although provision was made for compensation in certain cases the compensation clauses did not cover the injury sustained by the plaintiffs in that case. The Act under consideration in the case before us contains two compensation sections—237 and 436. Section 237 says "If any land be taken under the provisions of this Act, the commissioners shall make compensation

(1) L R., 6 App Cas, 193.

(2) L R., 11 App Cas., 45 at p. 64.

(3) [1899] A C, 535

to the owner or occupier of any adjoining land or building for any direct or immediate damage done thereto by the taking of such land". Section 436 is a general clause and is in the following terms:—"The commissioners may make compensation, out of the municipal fund, to all persons sustaining any damage by reason of the exercise of any of the powers vested in the commissioners, their officers or servants under and by virtue of this Act"

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The fact that the enactment itself gives a right to compensation is a consideration which may properly be taken into account. See the judgment of Lord Blackburn in the small-pox case. In the present case the plaintiff does not claim compensation under the Statute. His claim is for damages by reason of his common law rights having been infringed.

In the case of *London and Brighton Railway Co. v. Truman*(1) the Company were authorised to purchase by agreement (in addition to the lands which they were empowered to acquire compulsorily) lands not exceeding fifty acres, in such places as should be deemed eligible for the purpose of providing yards and other conveniences for receiving and keeping, amongst other things, cattle intended to be conveyed by railway. The Act contained no provision for compensation in respect of lands so purchased by agreement. The Company bought land and used it for a cattle-yard. The use of the land amounted to a nuisance, which, but for the Act, would have been actionable. There was no negligence in the mode in which the Company conducted the business. The House of Lords, reversing the decisions of the Court of Appeal and of North, J., held that the Company were protected and that the adjoining occupiers were not entitled to an injunction. It is to be observed that in this case (a) the Company were merely authorised, not enjoined, to erect cattle-sheds; (b) the Act contained no provision for compensation to parties who might be injured by the erection of cattle-sheds.

In the case before us (a) the defendants are under a statutory obligation to open burning grounds; (b) provision is made for compensation. In these two respects, therefore, it may be said that as regards the question of law under consideration the position of the present defendants is stronger than that of the Railway Company in the Railway case.

(1) L R, 11 App Cas, 45 at p. 64.

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The plaintiff's counsel laid stress upon the fact that the local limits within which burning grounds are to be opened are in no way circumscribed or defined. The words are no doubt quite general:—"Either within or without the City limits," and he sought to distinguish the present case from *London and Brighton Railway Co. v. Truman*(1) upon this ground. It seems to me that this suggested distinction is more apparent than real. It is true that in *London and Brighton Railway Co. v. Truman*(1) the lands which the Company were authorised to acquire for the purpose of erecting cattle-sheds were not to exceed 50 acres, but it is also true that the Statute imposed no limitation on the discretion of the Company in the selection of the site of these lands. The Lord Chancellor, however, points out that, as a matter of physical necessity, the lands could only be taken where they could be used for the purpose of the railway authorised by the Act. So, in the present case, though, I admit, in a less degree, the burning ground could only be opened at a place where it was accessible to the community for whose benefit it was opened. Otherwise, the object which the Legislature had in view in enjoining the opening of burning grounds would be frustrated. The words "within or without the limits of the city" must be read *secundum subjectam materiam* and with reference to the requirements of the community in connection with the disposal of corpses and the general necessities of the case. The following passage and judgment of Lord Selborne in the small-pox hospital case, seems to me, without unduly straining the language, to cover the present case:—"If the Legislature had authorised some compulsory interference with private rights of property, within local limits which it might have thought fit to define, for the purpose of establishing this asylum to be used for the reception of patients suffering from small-pox or other infectious disorders, and had provided for compensation to those who might be thereby injuriously affected (in such cases and under such conditions as it might have prescribed) the present case might have been like *Rex v. Pease*(2) and *Hammersmith, &c., Railway Co. v. Brand*(3)." And, with reference to this question of the selection of a site, the same learned Judge, in his judgment in *London and Brighton Railway Co. v. Truman*(1) observes:—"It was urged that

(1) L.R., 11 App. Cas., 45.

(2) 4 B. & Ad., 30.

(3) L.R., 4 H.L., 171.

the Company having an option as to place were bound to exercise it so that no adjoining landowner (or I suppose any other person) should suffer detriment from the subsequent use of the land for the authorised purposes. If it were the duty of the Company in deciding upon the eligibility of the place to be governed by such considerations, they might be placed in very great difficulty. For even if any place could be found where no person would be liable to suffer detriment from the establishment of loading and unloading places for cattle near his land, it is obvious that the other considerations relative to the convenience of the Company's traffic, which the Legislature must primarily have had in view, might have to be disregarded. The natural (and to the Company and the public the most convenient) places for receiving and discharging cattle traffic to and from a railway must be in connection with, or in proximity to, stations at or near market towns or other populous places, certainly not in fields remote from any human habitations. But even if the Company were to establish a cattle station at a distance from any human habitation, it seems possible, from the case of *Sturges v. Bridgman*(1), that the law of nuisance might still pursue them there (unless protected from it on the principle of *Rex v. Pease*(2)) in the event of an adjoining landowner afterwards thinking fit to build a house upon his own property."

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In my opinion the present case approaches more nearly to *London and Brighton Railway Co. v. Truman*(3) than to *Metro-politan Asylum District v. Hill*(4) and I think it is governed by the former and not by the latter authority. With regard to the Bombay case which was relied upon by the appellant (*Sayad Jafir Saheb v. Sayad Kadir Rahman*(5)) the present case is distinguishable on the ground that there was nothing in the Bombay Act which necessarily required the erection of privies.

In my judgment no actionable nuisance has been proved, but assuming that the proper finding on the evidence would be that an actionable nuisance has been proved, I think that the defendants are protected for the reasons I have stated.

This being my view, it is not necessary for me to deal with the question of limitation. If it were, I should be disposed to hold

(1) L.R., 11 Ch. D., 852 at p. 865.

(2) 4 B. & Ad., 30.

(3) L.R., 11 App. Cas., 45.

(4) L.R., 6 App. Cas., 193.

(5) I.L.R., 12 Bom., 684.

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that as against the present defendants the plaintiff's cause of action arose when the ground began to be used as a burning ground, and that as against them he is time-barred both under section 433 of the Act and also under the general law.

The appeal is dismissed with costs. I certify for two counsel.

MOORE, J.—The plaintiff, as the owner of a bungalow, factory and garden situated in Suryanarayana Chetti Street, Tondiarpet, Madras, has brought this suit against the Municipal Commissioners for the City of Madras, alleging that in consequence of the defendants having in 1896 opened a burial and burning ground close to his premises, those premises have become unhealthy, insanitary, and unfit for residential purposes, that he has been unable to work his factory for drying and dressing tanned skins and hides and that his property has deteriorated in value to the extent of Rs. 12,000. He, therefore, prays for an injunction restraining the defendants from using the land acquired by them as a burning and burial ground and claims Rs. 14,880 as damages. The defendants in their written statement plead, *inter alia*, that the plot of land mentioned in the plaint was acquired and provided by them as a burial and burning ground under the statutory obligation laid on them by the provisions of section 392 of the Madras Municipal Act and that it is a convenient and fitting place to be used for such purposes. The second issue framed by Mr. Justice Shephard is as to whether the user of the defendants' land in the manner alleged in the plaint is a nuisance to the plaintiff and is as such actionable?

In considering the question as to whether the defendants have by using the land mentioned in the plaint as a burial and burning ground caused nuisance to the plaintiff, it is necessary in the first instance to refer in some detail to the evidence given by the plaintiff himself. Before doing so, however, I am constrained to observe that that evidence shows that the plaintiff is by no means a truthful or accurate witness. This is proved by the following facts. The plaintiff deposes that, after he purchased the property to which this suit relates, he expended a sum of Rs. 10,000 on it. He says that, when he bought the property in June 1893, there was a bungalow on it but no other buildings and that he added a kitchen, bath-room and factory and put a wall round the bungalow. There is no wall round the bungalow and Mr. Cammiade, whose evidence is accepted by both sides as trustworthy, deposes that, when he occupied the premises 18 years ago, there was a

bangalow and a tannery and that the present tannery is simply the old tannery renovated. The plaintiff has made no attempt to prove that he spent Rs. 10,000 or anything like that sum on buildings, &c. He produces no documents or accounts in support of this assertion and Sir George Moore, who has known the place since 1887 and visited the plaintiff's premises year by year ever since then, states that he does not believe that the plaintiff has spent Rs. 10 on them. It is perfectly certain that the plaintiff made a most untruthful statement when he deposed that he expended Rs. 10,000 on the buildings, &c. As to his accuracy one matter will be enough to allude to. He deposes that on an average 10 corpses were burnt in a day on the burning ground. Almost immediately afterwards he altered this assertion and said that the daily average was 4, 5, 7 or 8. If in the years 1897, 1898 and 1899 an average of 10 a day had been burned, the total would have been 10,950 while at 4 a day it would be 4,380. Sir George Moore however shows that the total number of corpses burnt in those years is only 374.

The following is the description given by Mr. Rencontre, the plaintiff's solicitor, in his letter (exhibit D) of the 31st May 1899 to the President of the Municipality, of the nuisance complained of:—"The smoke emitted from the burning of the corpses enters my client's dwelling house and is suffocating and the odour that exudes from the corpses is sickening, so much so that since the plot of ground is used as a burning and burial ground my client's said house was and is untenanted. My client himself tried to live there but had to leave it in consequence of the unhealthy smoke and noxious gas emitted from the said burning ground. The smoke hangs like a cloud over my client's premises for hours together." The evidence put forward to make good these assertions is in the main as follows:—The plaintiff deposes that he bought the premises in June 1893. He lived there till the end of 1894 and then leased them to Sultan Mohidin who occupied them till September or October 1896, *i.e.*, till a month or so after the opening of the burning ground. An attempt has been made to show that Sultan Mohidin left because of the nuisance now complained of but this is not borne out by the plaintiff's own evidence. What he says is that this tenant had told him all along that he would leave as soon as the burial and burning ground was opened and that he did so. After Sultan Mohidin had left the plaintiff had his skins stored on the premises and continued to go

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there He says, however, that he was unable to bear the smoke from the corpses and that he bought other premises in which to live and carry on his business. The statement is, however, contradicted by him later on in his deposition when giving evidence as to why Police Inspector Mitchell refused to live in the house. He says that early in 1899 Mr. Mitchell proposed to take the house on lease from him for six months as he wanted it as a place of residence for his wife and children. Mrs. Mitchell, however, having visited the place refused to live in the house as there was a bad smell there As to this the plaintiff deposes that the smell was bad in 1897, 1898 and 1899 but that he did not complain as he did not want to bother the Municipality. He then adds that he first realised that it was necessary to complain when Mr Mitchell refused to live in the house. He did not believe his other tenants but when Mr Mitchell complained, he thought that there must be something in it This is absolutely unreconcilable with his assertion that he had to give up using the factory in 1897 because he was unable to bear the smoke from the corpses. There are some 60 cocoanut trees on the land round the plaintiff's bungalow. He leased these to one Murugappa Gramani in 1896 as he wanted to draw toddy from them, but the lessee gave up the lease after a year, and the plaintiff was not able to get any one else to take it up. He deposes that people said that, as the burial ground was situated opposite to his land, they were afraid to go there at night and that they also objected to the smoke arising from the burning ground during the day time The plaintiff further deposes that after Inspector Mitchell had refused to occupy the house one Muhammad Kasim, it appears, (exhibit C) agreed to be the plaintiff's tenant for six months from 1st June 1899, but he gave up the house almost immediately as the water in the well was not good and as there was an offensive smell from the burning ground. It does not appear that any attempt was made to let the premises from the date on which Muhammad Kasim left up to the filing of this suit.

The evidence put forward to corroborate the plaintiff's allegations as to the nuisance caused by the smoke from the burning ground is meagre and unsatisfactory. Sultan Mohidin Saheb admits that the agreement that he entered into with the plaintiff was that he should vacate the premises as soon as the burial ground was opened. He deposes that there was a bad smell from

the burial and burning ground but as it is shown that he left almost immediately after the burning ground had been opened and when only a few corpses had actually been burnt there, his evidence as to this is of but little value. The next witness is Muhammad Kasim. He says that he vacated the house because his children having got ill he sent for Lieutenant-Colonel Lee, I M.S., who advised him to leave. Colonel Lee has not been examined and it is impossible to say why he gave this advice. It is most probable that it was because of the bad water supply and the proximity of the sewage farm that he recommended that the witness should take his children away. In the absence of evidence as to why the Medical officer considered the house unhealthy no importance can be attached to the fact that he advised this witness to leave the place. Police Inspector Mitchell's evidence is very remarkable. He knew the place well as he used to visit it constantly when on his beat and it must be presumed that he would not have proposed to take his wife and children there for change of air if he thought that the smoke arising from the burning ground caused a serious nuisance to persons living in the house. He deposes that there was "a lot of smoke about and a rather offensive smell" which he was told came from the cremation platform. He does not, however, appear to have taken the trouble to ascertain for himself whence the smoke came. He cannot have found the smell offensive for he agreed to take the buildings on a lease for some months provided his wife liked them. He took Mrs. Mitchell there one evening and she, he says, stopped close to the large sewage channel, which he states is about 150 yards distant from the house, found the smell most offensive and would not go any closer to the building. Mrs. Mitchell has not been examined but as far as can be seen from her husband's evidence it was the smell of the sewage farm that she objected to and there is cogent evidence that the smell of the sewage is most powerful and offensive. P. Murugappa Gramani who took the lease of the toddy-giving trees from the plaintiff for a year deposes that he refused to renew the lease because the tree-climbers refused to work owing to the smell from the burning ground. It is impossible to credit this assertion. Rajagopal Gramani, one of the plaintiff's witnesses, deposes that dhobies wash clothes on the plaintiff's premises. There are no grounds for supposing that the nostrils of toddy-drawers are more sensitive than those of washermen.

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It is shown that the plaintiff's bungalow and factory are in a dilapidated condition and that they have not been occupied for a considerable time. The plaintiff's case is that they have remained unoccupied because owing to the nuisance caused by the burial and burning ground opened by the defendants no tenant will live there. The evidence, however, does not, as has been shown, bear out this contention. It is of course not possible to say positively why it is that the premises have remained unoccupied but there is cogent evidence on the record to prove that it is the proximity of the sewage farm and not of the burning ground that has frightened away intending tenants. As to this Mr. Cammiade, a witness whose evidence appears to be deserving of far greater weight than that which can be attached to most of the evidence put forward for the plaintiff, says "practically the contamination of the water by the sewage of itself would make the bungalow uninhabitable even without considering the burial ground. The stench from the sewage farm is very bad" and to this the plaintiff himself adds as follows:—"The sewage farm affects the premises seriously. It depreciates the land by half its value. It has depreciated mine to that extent. People will not take my bungalow apart from the burial and burning ground because of the sewage farm."

A great deal has been said at the hearing of this appeal regarding a well in the garden attached to the plaintiff's bungalow the water in which, it is alleged, has been contaminated in consequence of the proximity of the burial ground. There is some evidence that the water in this well was fairly pure and good when the plaintiff acquired the premises and there can be no doubt that when this suit was filed it had become foul and unfit for use. There is, however, no evidence of any value to prove that this change in the quality of the water is due to the burial ground. The evidence of Major Robertson, I.M.S., as to this is worthless.

Taking the evidence therefore as a whole it must, in my opinion, be held that no nuisance whatever has been caused to the plaintiff by the burial ground. There is some evidence that the burning ground is a source of nuisance to a certain extent to any one occupying the plaintiff's premises. That nuisance is said to be caused by the smell of the smoke arising from the burning ground whenever corpses are consumed there. It will be found, however, that of the burning platforms on which the corpses are burnt the nearest to the plaintiff's bungalow is at a distance of 485

feet. Sir George Moore's evidence also shows that the number of corpses burnt is about one every three days. These two facts, as it appears to me, explain why it is that the plaintiff has been unable to produce any trustworthy evidence that any appreciable nuisance is caused by the burning of corpses to person occupying his premises. The plaintiff in order to be entitled to either an injunction or damages must show that the injury suffered by him is not merely nominal but real and substantial. This he has in my opinion failed to prove. I concur with the learned Chief Justice in holding that this appeal should be dismissed with costs.

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Messrs. *Grant & Greathouse*—Attorneys for appellant.

Messrs. *Barclay, Orr, David & Brightuell* — Attorneys for respondents.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Moore.

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Evidence Act—Act I of 1872, ss. 114, 133—Evidence of accomplice—Corroboration.

Certain persons were charged with the murder of N. The confessional statement of one of them and the evidence of an approver showed that the accused first attacked N, at a spot described as D; that they then carried him from D to a spot described as E, and that from E they carried him to a spot described as F, where he was killed. Three other witnesses deposed to the presence of the accused at D.

Held, that the evidence of the approver was sufficiently corroborated to justify a conviction.

Reg v. Wilkes, (7 C. & P., 272) and *Queen v. Blah Dac*, (B.L.R., Sup. Vol. (F.B.), 459), referred to.

APPEAL by four accused against convictions and sentences on a charge of murder. The body of one Nabi Sahib was found on 16th May 1901, and six persons were charged with having caused his death. On 19th May first accused made a confessional statement in which he implicated himself and the accused Nos. 2 to 5.

* Referred Trial No. 39 of 1901 referred by A. Venkataramana Pai, Acting Sessions Judge of Bellary Division, for confirmation of the sentence of death passed in Sessions Case No. 27 of 1901.

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From this statement and from other evidence in the case it appeared that the injuries from which the deceased died were inflicted at three different spots, which were described as D, E and F respectively. In his statement already referred to, first accused deposed that he and accused Nos 2 to 5 and the third prosecution witness (who gave evidence as an approver) began their attack on the deceased at D; that accused Nos. 2 to 5 and the approver then carried him to E, and then to F, where he was killed. On 1st June this accused made a further statement, in which he admitted having struck the deceased, and that he had assisted in carrying him from E to F. The body was found close to F. This accused adhered to these statements when the charge was read to him on 27th June, but repudiated them at the Sessions Court. Of the witnesses called for the prosecution the third gave evidence as an approver. He implicated the first accused as having taken a prominent part in the attack on the deceased. He also deposed that accused Nos. 2, 3 and 4 were present at the attack at D; and that they assisted in carrying the deceased from D to E, and also from E to F. Whilst going from E to F they committed serious injuries on him. His evidence was corroborated in the following manner:—the fourth prosecution witness implicated these three accused as having taken part in the attack at D. The fifth and seventh witnesses also deposed to the presence of accused Nos. 2, 3 and 4 at D, and that they had taken some part in the attack there committed. On 1st June, these three accused admitted, before the committing Magistrate that they had been present at D; but their case was that they did not accompany the murderers to F. The Sessions Judge acquitted accused Nos. 5 and 6 and convicted accused Nos. 1, 2, 3, and 4, sentencing accused No. 1 to death and accused Nos. 2, 3 and 4 to transportation for life.

Accused Nos. 1 to 4 appealed.

K. R. Subrahmania Sastri, for the accused, (after dealing with the evidence), submitted that the evidence of the approver (third prosecution witness) had not been sufficiently corroborated to justify a conviction. There was corroboration of his statement up to a certain point, namely, that the accused were present at D. But the murder was not committed, or at all events was not completed, at D. It was committed at F, or between E and F. He referred to *Ameer Ali* on 'Evidence,' page 811, citing *Reg v.*

Wilkes(1) and *Queen v. Elahi Bax*(2), and submitted that the corroborative evidence which had been given of the approver's statement that the accused were present at D was not corroboration of his statement that they were also at E and F.

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The Public Prosecutor (Mr. E. B. Powell), for the Crown, contended that the corroboration was sufficient, and that the evidence of an approver need not be confirmed in every particular; and that it is sufficient if it be confirmed in material particulars. He referred to *Queen-Empress v. Krishna Bhatta*(3).

The Court delivered the following judgments:—

MOORE, J.—Six men were charged before the Sessions Judge with the murder of one Nabi Sahib. He has convicted Nos 1, 2, 3 and 4 and acquitted Nos 5 and 6. No. 1 has been sentenced to death and Nos 2, 3 and 4 to transportation for life. They appeal.

The case against the first prisoner is very strong. The third prosecution witness, an approver, has described in detail the manner in which Nabi Sahib was killed and has shown that this prisoner took a prominent part in the attack on him. His evidence is corroborated in certain important particulars by the fourth witness, a boy of about 13 years of age, who is the nephew of the first prisoner. This boy was present when the attack commenced, but ran away before Nabi Sahib received very serious injuries. The fifth and seventh witnesses also saw the first prisoner with others strike Nabi Sahib, but they also left the place before the man was killed. Nabi Sahib was killed on the 12th May. His body was discovered on the 16th and on the 19th the first prisoner made a confessional statement which has been recorded under section 164 of the Code of Criminal Procedure by the Adoni Second-class Magistrate. He there says that the fifth prisoner hit Nabi Sahib with the handle of a hatchet and on that the second, third and fourth prisoners and the approver beat him. The first prisoner also hit him with the handle of a hatchet. This happened at the spot marked D on the plan. They then carried him, the first prisoner assisting, to a spot where there is what is called in the evidence a jammi tree (E in the plan). After that he was carried to the margosa tree (F in the plan) where he was killed. This prisoner did not in this statement admit that he assisted in carrying Nabi Sahib from E to F, or that he was one of those that

(1) 7 C. & P., 272.

(2) B.L.R., Sup. Vol., (F.B.), 459.

(3) Referred Trial No. 27 of 1895 (unreported).

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actually struck him at F. On the 1st June the first prisoner in a further statement made before the Magistrate admitted that he had struck the deceased with the handle of an axe and that he had assisted in carrying him to E and thence on to F. He says "we tied up his hands and legs, took him to the hollow place near Nallagutta (Nallagutta is the place where the body was found. It is close to F) and made him lie down there." When on the 27th June the charge was read to him he adhered to what he had previously said and it was not till he was before the Sessions Judge that he repudiated his confessional statements. I believe the evidence of the approver which has been corroborated in certain most important particulars by the fourth, fifth and seventh witnesses. There are no grounds for supposing that the confessional statements made by the first prisoner were not given voluntarily. I have no hesitation in upholding the conviction of this man, but I consider that the sentence passed on him should be altered to transportation for life as I am satisfied, from a consideration of the evidence, that the first prisoner was not one of the prime movers in the attack on Nabi Sahib and that, if it had not been for the intervention of other persons, whose case is not now before this Court, Nabi Sahib might perhaps have been beaten, but would certainly not have been murdered. All the evidence in my opinion points to this conclusion.

Criminal Appeal No. 418 of 1901 has been put in by the second, third and fourth prisoners who have been convicted of murder and sentenced to transportation for life. The evidence of the approver shows clearly that these three men were present at the attack made on Nabi Sahib at the spot marked D, that they assisted in carrying him from that place to the spot marked E and also from E to F where the man was killed. The second prisoner is said by this witness to have held Nabi Sahib's head as he was being carried from E to F and when he had been thrown down at the latter spot the third and fourth prisoners each threw a stone on him. As I have already stated, I believe that evidence but a question has been raised at the hearing of this appeal as to whether it has been corroborated in such a manner as to justify the conviction of these prisoners. The law as to the extent to which such corroboration is required is clear. Section 133 of the Evidence Act lays down that a conviction is not illegal, merely because it proceeds upon the uncorroborated testimony of an accomplice, but

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the section must be read with illustration (b) appended to section 114 where it is stated that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. In numerous reported decisions relating to these provisions of the law it has been laid down that the testimony of the approver ought to be corroborated in some material circumstance, such circumstance connecting and identifying the prisoner with the offence or as a learned English Judge observed in a case that is constantly cited "The confirmation which I always advise juries to require is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged (*Reg. v. Wilkes*)(1) per Alderson, B.—*vide* also the judgment of Chief Justice Peacock in *Queen v. Elahi Bax*(2). It is therefore necessary to consider in some detail the evidence that has been produced to corroborate the approver in so far as prisoners Nos. 2, 3 and 4 are concerned. The fourth witness gives an account of the attack made on Nabi Sahib at the spot marked D. He states that when the fifth and sixth prisoners seized hold of Nabi Sahib prisoners Nos. 2, 3 and 4 were present. He says "the others were standing aside." . . . "They all surrounded Nabi Sahib." . . . "When I went to my house I told my mother that all surrounded and beat Nabi Sahib." In cross-examination he states that he did not see the second, third and fourth prisoners beat Nabi Sahib. This boy is, as has been pointed out already, a nephew of the first prisoner and he has before the Sessions Court shown a great anxiety to implicate his uncle and his uncle's companions, the prisoners whose case is now under consideration, as little as possible. When, however, he was examined before the Committing Magistrate on the 31st May, he deposed as follows:— "All beat . . . accused Nos. 1, 2, 3 and 4 beat. I did not see with what they beat." If this evidence is believed, and I see no ground for discrediting it, it proves that the second, third and fourth prisoners took an active part in beating Nabi Sahib at the spot marked D in the plan. This evidence is corroborated to a certain extent by that given by the fifth and seventh witnesses. The former of these women deposes that when the men were disputing with Nabi Sahib about their bundles of wood she saw the second, third and fourth prisoners among the disputants. She

(1) 7 C. & P., 272.

(2) B.L.R., Sup. Vol., (F.B.), 459.

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then goes on to say that Nabi Sahib seized the first prisoner's bundle, threw it down and pushed him and adds "thereupon they surrounded him" "She then described the manner in which Nabi Sahib was wounded by a blow struck with a hatchet. The seventh witness also was present when the altercation took place and she deposes that she saw the second, third and fourth prisoners among others get up and seize hold of Nabi Sahib by the waist. When examined before the Sub-Magistrate on the 16th May, the day that the body of the deceased was found, this witness said that she saw the first, third and fourth prisoners and the approver surrounding Nabi Sahib and beating him. The second prisoner, she says, "was standing afar" Before the Sessions Judge she admitted having made this statement to the Magistrate. When before the Committing Magistrate on the 1st June these three prisoners admitted that they were present at the early portion of the attack on Nabi Sahib, but pleaded that they did not accompany the murderers up to the place where the man was killed. It appears to me that the evidence of the fourth, fifth and seventh witnesses, which I have alluded to, affords such corroboration of the statements of the approver as is required by law in order to uphold a conviction. That evidence shows that not only were the prisoners Nos. 2, 3 and 4 present when the murderous attack on Nabi Sahib commenced, but also that they joined actively in that attack. Such evidence must, as it appears to me, be held to afford a confirmation of the accomplice in important facts which go to fix the guilt on these particular persons. It may also be added that the first prisoner in his confessional statements implicates these prisoners and these statements can be taken into consideration against them although they are not evidence in the strict sense of the word and cannot be held to afford corroboration of the tainted evidence of the accomplice. I am of opinion that the appeal presented by prisoners Nos 2, 3 and 4 should be dismissed. I however, consider that the case of the second and third prisoners should be brought to the special notice of Government with a view to the reduction of the sentences imposed on them.

DAVIES, J.—I concur throughout

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Bhashyam Ayyangar.

SUDARSANAM MAISTRI (PLAINTIFF), APPELLANT,

v.

NARASIMHULU MAISTRI AND ANOTHER (DEFENDANTS),
RESPONDENTS *

1901
September 9,
10, 11, 20

Hindu Law—Mitakshara doctrine of joint family property—Limitation Act—Act IV of 1877, sched II, art 106—Partnership—Contract Act—Act IX of 1872, ss 239, 253.

V and his five sons constituted an undivided Hindu family. V and his three elder sons lived apart from the two youngest sons and were in possession of some ancestral property. The two youngest sons were plaintiff and first defendant respectively in this suit. Plaintiff sued this brother for an account and for partition of certain property which he alleged to be the property of a joint family consisting of the first defendant and himself. The property had, as plaintiff alleged, been acquired from the funds of a business which had been carried on jointly by him and first defendant until 1894, and continued by the first defendant until the institution of the suit. It was alleged that although there had not been an express agreement of partnership, in the circumstances of the case an agreement under which plaintiff had become jointly interested in the business ought to be inferred.

Held, that plaintiff had not a joint interest in the contract business and was not entitled to claim a share in it.

Held also, that even if such an interest had existed plaintiff's claim was barred by limitation. *Moung Tha Hnyin v Mah Them Myah*, (L R, 27 I A, 189, I L R, 23 Cal, 53), distinguished.

Per BHASHYAM AYYANGAR, J.—It was impossible to regard plaintiff and first defendant as forming in themselves an undivided family owning joint family property as a corporate body.

Sham Narain v Court of Wards, (20 W.R., (O R), 197), commented on.

The origin and nature of the Mitakshara doctrine of joint family property discussed.

Peddayya v Ramalingam, (I L R, 11 Mad, 406), referred to. *Radha Churn Dass v. Krupa Sindhu Dass*, (I L R, 5 Cal, 474), considered. *Rampershad Tewarry v. Sheochurn Dass*, (10 M I A, 490), distinguished.

SUIT for an account of joint property, for partition, and for possession of plaintiff's share. The pleadings and facts are summarised in the judgments. The two issues material to the

* Original Side Appeal No 8 of 1901, against the decree of Mr. Justice Boddam, in Civil Suit No. 159 of 1900.

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questions considered in the appeal were:—(1) “Whether the plaintiff and the defendant joined in a contract business and jointly acquired therefrom the property mentioned in the plaint;” and (5) “Whether the suit is barred by limitation.” The learned Judge sitting on the Original Side found the first issue in the negative, and dismissed the suit.

Plaintiff preferred this appeal.

The Advocate-General (Hon’ble Mr *J P Wallis*), for the appellant.

Mr *K Brown* for the respondents.

Their Lordships delivered the following judgments.—

Sir ARNOLD WHITE, C.J.—The plaintiff and the first defendant are the two youngest sons of one Virasami Maistri. The family is undivided, and three elder brothers of the plaintiff and first defendant and the father Virasami Maistri are alive. The plaintiff alleges that there is some ancestral property of which the father and the three elder brothers are in possession and that they have lived separate from the plaintiff and the first defendant since 1874. The plaintiff sues for an account and partition of property which he alleges to be joint property acquired by him and the first defendant as undivided brothers. In the circumstances in which the suit is brought, the fact that the plaintiff and the first defendant are undivided is only material as an element in the case which has to be taken into consideration in determining whether the evidence as to the circumstances in which the business was carried on justifies the inference that the business in which the property was acquired was a joint business. The first question for determination is correctly stated in the first issue, viz, whether the plaintiff and the defendant joined in a contract business and jointly acquired therefrom the property mentioned in the plaint.

One Varadamma is the elder sister of the plaintiff and the first defendant. Her husband Varadayya had a contract business with the Madras railway. Some years before his death the first defendant came to live with his sister Varadamma and her husband. About five years later, according to Varadamma’s evidence, the plaintiff did the same. In 1881 the first defendant married Varadamma’s step-daughter. In 1884 Varadayya died. In 1891 the plaintiff married Varadamma’s daughter. In 1887 Varadamma arranged with the Madras Railway that certain contract work should be given to the first defendant. The contract was in

the name of the first defendant. This, according to Varadamma's evidence, was because he was "our eldest male living in the house." According to her evidence, she had applied to the railway company for the work to be given "for the protection of our family." The plaintiff's case is that he has a joint interest in all the profits of contract work done for the railway company from 1887 down to the date of the institution of the suit. He does not suggest anything in the nature of an express agreement but he says that, in the circumstances of this case, an agreement under which he became jointly interested in the business ought to be inferred [His Lordship then dealt with the evidence and continued :—] Taking the evidence, however, as a whole, I have come to the conclusion that it does not justify the inference that the plaintiff had a joint interest in the contract business and I think the Judge was right in his finding that the answer to the first issue ought to be in the negative.

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[After dealing further with the evidence His Lordship concluded :—] In the view I take of the facts it is not necessary for me to consider the question of limitation. With regard to this question, however, I am of opinion that if there ever was an agreement between the brothers in the nature of a partnership agreement, that agreement came to an end in 1894 and the plaintiff's claim is consequently barred by limitation.

This appeal is dismissed with costs.

BHASHYAM AYYANGAR, J.—This is an appeal preferred by the plaintiff against the judgment of Mr. Justice Boddam in Civil Suit No. 159 of 1900, dated 16th January 1901, dismissing the suit with costs. The suit was brought by the plaintiff for taking an account of property alleged to have been jointly acquired by the plaintiff and the first defendant as undivided brothers, for ascertaining the respective shares of plaintiff and first defendant therein and for a decree awarding to him his share in such properties.

The cause of action, as disclosed in the plaint, is that the plaintiff and the first defendant carried on jointly some contract business until the year 1894, when, disputes and differences having arisen between them, the first defendant and his wife, the second defendant, left the house in which they were till then living with the plaintiff, as members of an undivided family, and went and lived separate. The property acquired from the funds of the contract business both prior to 1894 and apparently subsequent

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thereto is estimated at Rs. 60,000 and a schedule of such property is annexed to the plaint. The plaintiff charges that the first defendant as the senior brother and member of the joint family, consisting of himself and the plaintiff, has been and continues to be in possession of such property and that he has fraudulently transferred or pretended to transfer a portion of this property to his wife, the second defendant. Though it is not stated in the plaint that the plaintiff is entitled to an equal share with the first defendant in such property, yet it is evident that he claims an equal share on the footing that the property, of which an account is sought to be taken, forms the joint property of an undivided family, consisting of himself and his brother, the first defendant, such property representing the profits of the contract business carried on by himself and his brother with the aid and assistance of their sister, though not with the aid of any ancestral property belonging to them.

The first defendant, while admitting the relationship alleged in the plaint, denies that he carried on any joint contract business with the plaintiff or that they were members of a joint and undivided family, and jointly acquired the property in question; he also relies on the plea of limitation, if the suit is regarded as based on an alleged partnership between himself and the plaintiff in the business referred to in the plaint.

Of the issues framed in the case, the only two which have to be considered in this appeal are the first and the fifth, viz.:—
(1) Whether the plaintiff and the defendant joined in a contract business and jointly acquired therefrom the property mentioned in the plaint (5) Whether the suit is barred by limitation.

Whether the first issue was intended to raise only the question that the acquisitions form joint family property under the Mitakshara law, on which footing the suit is evidently based, or also in the alternative, the question as to whether the plaintiff and first defendant carried on the contract business, as partners, is not clear.

The questions chiefly argued on behalf of the appellant are—
(i) that the property in question forms the joint family property of the plaintiff and the first defendant, having been acquired by their joint labour and exertions and that as such it is liable to partition between them; (ii) that, even if it cannot be regarded as joint family property, the plaintiff as a partner with the first defendant is entitled to an equal share in the profits of the contract

business; and (iii) that, in either view, the suit is not barred by the law of limitation

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In support of the first contention, the learned Advocate-General strongly relied upon the decision of the Privy Council in *Rampershad Teuarry v. Sheochurn Doss* (1) and paragraph 277 of Mayne's 'Hindu Law and Usage' (6th edition). Assuming that the contract business in question was carried on by the joint labour and exertions of plaintiff and first defendant, the present case is, in my opinion, clearly distinguishable from the above case, the fundamental difference being that the business in the above case was carried on by and on behalf of all the members of the joint family, viz., the five undivided brothers—whereas in the present case plaintiff and first defendant are only two out of five brothers, who, with their father, constitute an undivided Hindu family, possessed of some joint ancestral property which it is stated in paragraph 3 of the plaint has been employed by the father and the three elder brothers of the plaintiff and first defendant since 1874 when the plaintiff and first defendant, alleged to be of the age of 6 and 9 years, respectively at the time, left their family house and went to live with their married sister, who maintained and brought them up, and about 1887, three years after her husband's death, advanced them in business by her influence with the Madras railway company, with whom her husband had been carrying on contract business on an extensive scale. The first defendant married his sister's step-daughter in 1881 and the plaintiff, her own daughter in 1891; and until sometime in 1893, the two brothers with their wives were living together in their sister's family.

It appears from exhibit B, the draft of a partition deed, and from the oral evidence relating thereto, that an attempt was made in 1898 to effect a partition among the six members of the family, viz., the father and the five sons; but it fell through and was not completed, owing apparently to certain of the members not acquiescing in the proposed distribution and allotment of the property among the various members.

Bearing these facts in mind, I shall now proceed to consider the principles of Hindu Law which, in my opinion, bear upon the determination of the question whether plaintiff and first defendant

(1) 10 M.L.A., 490.

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can be regarded as owning the property in question as members of a joint family.

The Mitakshara doctrine of joint family property is founded upon the existence of an undivided family, as a corporate body (*Gan Savant Bal Savant v. Narayan Dhond Savant*(1) and Mayne's 'Hindu Law and Usage,' 6th edition, paragraph 270) and the possession of property by such corporate body. The first requisite therefore is the family unit; and the possession by it of property is the second requisite. For the present purpose, female members of the family may be left out of consideration and the conception of a Hindu family is a common male ancestor with his lineal descendants in the male line, and so long as that family is in its normal condition, viz., the undivided state—it forms a corporate body. Such corporate body, with its heritage, is purely a creature of law and cannot be created by act of parties, save in so far that, by adoption, a stranger may be affiliated as a member of that corporate family. Persons, who by birth or adoption are not members of a Hindu family, cannot, in the absence of a custom having the force of law, by mere agreement, become or be made members of a joint family.

According to the above conception of a family, there may, of course, be one or more families all with one common ancestor, and each of the branches of that family, with a separate common ancestor.

As regards the property of such family, the 'unobstructed heritage' devolving on such family, with its accretions, is owned by the family as a corporate body, and one or more branches of that family, each forming a corporate body within a larger corporate body, may possess separate 'unobstructed heritage' which with its accretions, may be exclusively owned by such branch as a corporate body.

The main family and its branches may possess joint property not only by operation of law but also by act of parties. Property acquired without the aid of joint family property, by one or more individual members thereof,—whether they belong to different branches or to one and the same branch of the family,—may by act of parties be incorporated with the joint property of the main family or of one of its branches; and a stranger may also gra

(1) I L.R., 7 Bom., 467 at p. 471.

property to the family as a whole (vide *Radhabai v. Nanasab*(1)), or to one of its branches (vide *Kunhacha Umma v. Kutti Mamm* *Hajee*(2)), as a corporate body. Even if the undivided family is not possessed of any nucleus of property which has come to it as 'unobstructed heritage,' it may be that, by act of parties, property acquired jointly by all the members or separately by one or more members thereof, can be impressed with the character and incidents of unobstructed heritage or joint property belonging to the main family or to any of its branches. Property devolving by inheritance as 'obstructed heritage' on all the members of a joint family (vide *Gopalasami v. Chinnusami*(3)), or upon any one of them, may likewise be impressed with the character of joint family property. But so long as a family remains an undivided unit, two or more members thereof—whether they be members of different branches or of one and the same branch of the family,—can have no legal existence as a separate independent unit; but if they comprise all the members of a branch, or of a sub-branch, they can form a distinct and separate corporate unit within the larger corporate unit and hold property as such. Such property may be the self-acquisition or 'obstructed heritage' of a paternal ancestor of that branch as distinguished from the other branches, which property has come to that branch and that branch alone as 'unobstructed heritage'; or it may be the self-acquisition of one or more individual members of that branch, which by act of parties has been impressed with the character of joint property, owned by that branch and that branch alone, to the exclusion of the other branches.

Mr. Mayne in paragraph 277 of his book while laying down that property acquired by the members of a joint family by their joint labour, would form their joint property, suggests a doubt as to whether their male issue would by birth alone acquire a right in such property. Apparently he inclines to the opinion that they would not, and that also appears to be the view taken by the Bombay High Court in *Chatturbhoj Meghji v. Dharamsi Naranji*(4) cited by Mr. Mayne. If the joint acquirers intended to hold the property so acquired as co-owners and not as joint family property in the Mitakshara sense of that expression, this view

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(1) I.L.R., 3 Bom., 151.

(3) I.L.R., 7 Mad., 458.

(2) I.L.R., 16 Mad., 201.

(4) I.L.R., 9 Bom., 438 at p. 445.

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would be perfectly sound. But, if, as supposed, the property was acquired by all the members of the undivided family, by their joint labour, it would, in the absence of any indication of intention to the contrary, be owned by them as joint family property and in that case their male issue, who, by their birth, become members of such undivided family, necessarily acquire a right by birth in such property. The natural persons, forming for the time being the members of an undivided Hindu family, fluctuate both by births and deaths in the family and any such person may also retire therefrom by civil death (Mayne on 'Hindu Law and Usage,' 6th edition, paragraph 603) or by renunciation on his part acquiesced in by the remaining members, provided such renunciation and acquiescence are manifested by an overt act—namely, the giving him 'some trifle' out of the family property (Mitakshara, chapter II, section II, verses 11 and 12; Stokes' 'Hindu Law Books,' page 380; Manu, chapter IX, p. 207; Yagnavalkya, 2—117). With all deference to Garth, C.J., I find myself wholly unable to concur in the proposition enunciated by that learned Judge that "a mere declaration by one member, that he was separate from the others, would seem to be sufficient to effect the separation" (in *Ratha Churn Dass v. Kripa Sundhu Dass* (1)).

In any one of the above contingencies the normal undivided state of the family and its legal character as a corporate body is in no way affected or disturbed.

But if one or more members become divided by partition, it is not equally clear that the status of the remaining members as an undivided family in its normal condition continues unaffected. By some of the Hindu lawyers a separation, such as to give one or more members their several shares, is regarded as necessarily involving a general partition. Those who have not separated, are, on this theory, looked on as re-united (West and Buhler 'Hindu Law,' 3rd edition, page 685). This view was adopted in some of the earlier decisions of the Calcutta High Court (vide *Jandut Chunder Ghose v. Benodbeharry Ghose* (2), *Petambur Dutt v. Harischandra Dutt* (3), *Sham Narain v. Court of Wards* (4), *Kesubram Mahapattar v. Nandkisor Mahapattar* (5), but is dissented from in a later decision of the same High Court (*Uppendra Narain Myti v. Gopee*

(1) 1 L.R., 5 Calc., 474 at p. 477

(3) 15 W.R., (C.R.), 200

(5) 2 B.L.R., (A.C.J.), 7.

(2) 1 Hyde, p., 214.

(4) 20 W.R., (C.R.), 197

Nath Bera(1)). So far as this Presidency is concerned, though there is no reported decision bearing directly on the point, (*Peddayya v. Ramalingam*(2), *decum* at page 408) the principle generally recognised and acted upon is that though there can be no compulsory partial partition either in respect of the joint property belonging to the family, or in respect of the persons constituting the undivided family, yet by mutual agreement of parties the partition can be partial either in respect of the property or of the persons constituting the family. And according to usage and custom the remaining members of an undivided family from which one or more alone have become divided, continue as an undivided family in its normal state and not as members, who after partition have become re-united.

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It is, therefore, impossible to regard the plaintiff and first defendant as forming in themselves an undivided family owning joint family property as a corporate body. I am aware that in *Sham Nasain v. Court of Wards*(3), which was not cited in the argument, it was held by a Division Bench of the Calcutta High Court that two, out of three undivided brothers forming a joint Hindu family, who between themselves held in common an acquired estate to the exclusion of the remaining undivided brother, might be regarded as having become divided and then re-united in respect of their shares of ancestral property and incorporated their common acquisition with their shares in the ancestral property.

In the present case, it has not been contended that plaintiff and the first defendant should be regarded, in respect of the property of which an account is sought to be taken, as re-united brothers and a partition effected between them on that footing. But even if such contention were open upon the pleadings in the cause and had been actually raised, I should have no hesitation in over-ruling the same and dissenting from the above decision of the Calcutta High Court. Unless some foundation were laid in fact for the theory of re-union, which necessarily pre-supposes a division *inter partes*, there is no warrant for importing a fiction of division followed by a fiction of re-union for the purpose of impressing property acquired or owned exclusively by some members of an undivided family who do not in themselves form a branch family,

(1) I.L.R., 9 Calo, 817

(2) I L.R., 11 Mad., 406.

(3) 20 W.R., (C.R.), 197

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with some of the incidents of joint family property. I say advisedly 'some' of the incidents of joint family property, for the re-united shares of re-united brothers and property acquired by them jointly after re-union are not on the same footing as the joint property of an undivided family in its normal condition. Such an estate is separately defined by the Hindu lawyers and partakes partly of the incidents of joint family property and partly of the incidents of separate property—(vide *Ramasami v. Venkatesam*(1), Mayne's 'Hindu Law and Usage,' 6th edition, paragraphs 496 and 586; Mitakshara, chapter II, section IX)

It is next argued on behalf of the appellant that, even if the contract works carried on by the first defendant cannot be regarded as the joint family business of plaintiff and the first defendant, it must be treated as a partnership business between the two brothers. It is not alleged that there was any express agreement of partnership, but that as the plaintiff regularly combined his labour with that of the first defendant in carrying on the contract business, an agreement of partnership should be implied between them—especially as they were related as brothers. On the other hand the position taken by the learned Counsel for the respondent is that the business was the sole business of the first defendant, but that the plaintiff was sometimes deputed by his brother to go and superintend the contract work when he, the first defendant, was unable to attend and that the plaintiff in order to receive training was now and then associated with him in superintending the contract business. The oral evidence on both sides as to the degree of attention paid by the plaintiff to the business and the supervision exercised by him over the same is, as usual, conflicting. But the preponderance and credibility of evidence is decidedly in favour of the plaintiff and I am satisfied that he was regularly and continuously contributing his labour and attention to the execution of contract works from 1888 to about the end of 1893; and I do not attach any importance to the defendant's contention that the plaintiff was too young to take any part in the contract business. Even according to the evidence of the defendant himself, the plaintiff was 15 years of age in 1887, if not older, and considering the nature of the contract works the plaintiff was of sufficient age to attend to them. The Madras railway company, no doubt,

(1) I.L.R., 16 Mad., 440.

entrusted the contract work to the first defendant only and it was he alone that dealt with the company and had the financial management of the business. Admittedly it was the sister of the plaintiff and first defendant who introduced the first defendant to the railway engineer and secured to him the contract business by her recommendation. It is clear from her evidence as plaintiff's first witness that she intended the contract business for the benefit of both her brothers and that she regarded both of them as jointly carrying on business, but there is nothing to show that she communicated either to the plaintiff or to the first defendant that such was her intention in introducing the latter to the Madras railway authorities. The business was started in 1887 with funds supplied to the first defendant from time to time by way of loan by one Chelvapillai Naidu under an arrangement that out of two and-a-half shares Chelvapillai was to have one share of the profits, the sister, half a share, and the defendant, the remaining one share. If the plaintiff was a partner with the first defendant, this one share would of course belong to both of them.

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The first contract appears to have ended in a loss in 1890 and the sum of Rs. 800 and odd then found due to Chelvapillai was repaid to him by the first defendant from a loan advanced to him by his sister. It does not appear from the evidence that, beyond the said amounts, any capital was contributed for the business. The loan, no doubt, was raised by the first defendant, but it cannot be regarded as capital contributed by him, for, if the plaintiff was a partner with him in the business, the debt will bind both equally.

There being no express agreement between the brothers in regard to the contract business, the question that presents itself for consideration is whether, under the above circumstances, a contract of partnership should be implied or whether the proper inference to be drawn is that there was no legal relation between the brothers in respect of the business, but that the plaintiff regularly and systematically assisted his elder brother in carrying on the work in view to learn business himself or in expectation that his elder brother would deal with him generously if profits were realized from the business or with both these objects.

In deciding this question one should of course have special regard to the social customs of the Hindus and to the fact that the plaintiff and the first defendant were brothers who were brought

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up and educated by their sister into whose family they married and with whom they lived, that the business in question was secured through the instrumentality of the sister, that the nature of the business was such that combination of labour was more important for success than contribution of capital and that the plaintiff's association with his brother in the business for a period of nearly six years was not casual but regular and continuous. It is immaterial whether or not the plaintiff bestowed upon the business as much time and attention and exercised as effective and as great a degree of supervision over it as his elder brother, the first defendant. But for the plaintiff's conduct subsequent to 1893 and a portion of his evidence in this suit—both of which will be presently adverted to,—I should have no hesitation in holding as a jurymen that both the plaintiff and his sister (who introduced the first defendant into the business) all along *bonâ fide* entertained the belief that plaintiff was interested equally with first defendant in the business, that the first defendant must have been fully aware that the sister introduced him into the business expecting that both the brothers who were living with her were to be benefited by it and that the plaintiff was devoting his time and attention to the business, fully believing that he was equally entitled with his elder brother to the profits of the business. Under these circumstances an agreement of partnership would be implied by law; and adverting to the principles of the law of estoppel embodied in section 115 of the Indian Evidence Act which is the same as the English Law, I may also add that it was the duty of the first defendant to speak out his mind, if it was his intention that the business was to be exclusively his own and that the plaintiff was to have no interest in it as a partner. His silence was culpable and he is estopped from contending that the plaintiff was not his partner in the business (*Sarat Chunder Dey v. Gopal Chunder Laha*(1)). The principle applicable to such a case is nowhere stated more lucidly than by Lord Kingsdown in his judgment in *Ramsden v. Dyson*(2). "If a man," says his Lordship, "under a verbal agreement with a landlord for a certain interest in land or what amounts to the same thing, under an expectation created and encouraged by the landlord that he shall have a certain interest takes possession of

(1) L.R., 19 I.A., 203, I.L.R., 20 Cal., 298.

(2) L.R., 1 H.L., 129 at p. 170.

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such land with the consent of the landlord and upon the faith of such promise or expectation with the knowledge of the landlord and without objection by him lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v. Mighell*(1), and as I conceive is open to no doubt."

This conclusion receives support from the circumstance that sometime after there was first a breach between the first defendant and his sister in 1893 and subsequently the relations between the brothers themselves became rather strained, and the first defendant removed to another house of his own, leaving the plaintiff to continue to live with his sister, she exerted her influence with the railway authorities and secured separate contracts directly to the plaintiff himself. Since then the plaintiff has been working the contracts he secured to himself separately and the first defendant working his contracts separately and sometimes in partnership with one or other of his brothers. The plaintiff and the first defendant, however, were sometimes helping each other in regard to their respective contracts, but the plaintiff's proposal to take the first defendant as his partner in his Ennore contract, was not accepted by the latter. During all this time and until the 4th August 1900 (the date of exhibit XLIII) the plaintiff does not appear to have asserted any claim to any of the properties acquired by the first defendant. The suit itself was instituted on the 19th September 1900 within six weeks after the date of the exhibit.

As regards the draft partition deed, (exhibit B), dated 24th May 1898, I think it highly probable that the first defendant was the author and moving spirit of it and that the plaintiff, whether under advice or not, refused to consent to its terms and declined to sign it. It is not clear whether he then advanced a claim to a half share of the earnings made by the first defendant from the contract business. It is possible that but for this attempt at partition the plaintiff might not have advanced any claim to the properties in question. The proposal having fallen through, the first defendant naturally grew anxious and had recourse to certain *benami* transfers of property in the name of his wife, the second defendant.

The exhibit which is most unfavourable to the plaintiff's case is exhibit II (14th December 1893), in which the plaintiff refers to

(1) 18 Ves, 328.

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one of the properties comprised in the plaint schedule as the garden of 'his brother' the first defendant while in the same letter he refers to the garden house of his sister in which he was living with her as 'our garden,' identifying himself apparently with his sister. If, as now claimed, the brother's garden therein referred to was the joint and common property of himself and his brother, it is very curious that he should refer to it as his brother's garden. Further, in his deposition, he states as follows:—"After the award, my brother went to live in the house" (referred to in exhibit II as the first defendant's garden) "we both erected at Madavakum, because he was displeased with my sister. Sometime after, there was a quarrel between us. He would not give me money, I asked for, while I was working for him We quarrelled because my brother would not give me money." No questions have been put to the plaintiff about this statement in view to its elucidation. *Prima facie* the statement indicates that plaintiff expected to be rewarded or remunerated for his having worked with the defendant in connection with the contract. If the earnings had been regarded as the joint family property of himself and the first defendant or as the profits of the first defendant's business in which plaintiff was a partner, he would not have simply demanded money for his having worked with the defendant in the business—a demand which implies that he expected reward or remuneration for his trouble—but he would have demanded his one half share in the defendant's earnings, a considerable portion of which was converted into house or landed property. He was not even paid any money as demanded by him. This was about the end of 1893 or beginning of 1894 and the plaintiff took no action whatever to assert his claim. This conduct on the part of the plaintiff coupled with the allusion in exhibit II to one of the properties mentioned in the plaint schedule as his brother's garden, leads to the inference that, for some reason or other which is not apparent on the record, the plaintiff when he was attending to the contract business of his brother and superintending it, did not do so with the understanding that he was to have a share in the profits of such business but that he only expected to be rewarded for his trouble and treated generously by his brother. In deciding whether or not the two brothers carried on the business as partners I attach no significance to the arbitration proceedings in 1893 between the sister and the defendant in the matter of the contract

business. There was then no occasion to define or refer to the relations between the plaintiff and the defendant in respect of the contract works. There was then no dispute between the brothers in regard to those works and the arbitrators had only to decide what amount was due to the sister.

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I now proceed to consider the question of limitation. If the properties, of which an account is sought to be taken, were the joint family property of the plaintiff and the first defendant, the plea of limitation will clearly be of no avail. But, if the plaintiff and the first defendant were partners in the contract business, which partnership, if any, clearly terminated about the end of 1893 or beginning of 1894, the suit is clearly barred by the law of limitation, and in this view the plaintiff's suit fails, even if the contract business in question was carried on in partnership between the brothers. It is apparently in anticipation of the plea of limitation that the plaintiff claims a share not only in the profits of the contract business which was carried on until about the beginning of 1894, but also in the profits of the business subsequently carried on by the first defendant, the profits of which latter business appear to have been much larger than the profits made till 1894.

A reference to the evidence of plaintiff and the first defendant and their sister clearly shows that if there was partnership between the plaintiff and the first defendant, it came to a termination—which is the same as a dissolution—sometime in 1894 and that, as already mentioned, the first defendant thereafter continued that business on his own account, and also undertook and carried on fresh contract business by himself or sometimes in partnership with one or other of his other brothers and that the plaintiff too obtained from the railway authorities other contract work for himself and carried on the same on his own account. The plaintiff says that the Ennore contract work which he obtained in 1894 and which he was carrying on for four years and which resulted in a profit of about Rs. 3,000 was his own concern and not a joint undertaking with the first defendant. But on the other hand he says that he claims a half share in the profits of the first defendant's contract works even subsequent to 1894, not on the ground that he was working with his brother as before in the execution of the work, but by reason of an understanding with his brother that the latter “should deal with him as he had been doing before and should not

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think of injuring him." The understanding herein referred to is vague and indefinite and there is no reliable evidence in support of it.

From the year 1894, therefore, the plaintiff ceased to be a member of the alleged partnership (*vide* section 253, clause 7 of the Indian Contract Act), and in fact he retired from the partnership, which had not been entered into for any fixed term (clause 8 of section 253, Indian Contract Act). It is therefore clear that the present suit, viewing it as one for winding up the affairs of the partnership which terminated or was dissolved in 1894, is barred by the Law of Limitation. The fact that after retirement of one of two partners, the remaining partner carries on the same business makes no difference (*Knox v Gye*(1)). The case of *Noyes v Crawley*(2) cited on behalf of the respondent is in point and at page 39 Malins, V.C., expresses his full concurrence in the following statement of the law by Lord Lindley in his treatise on 'Partnership,' 4th edition, page 966—"So long, indeed, as a partnership is subsisting and each partner is exercising his rights and enjoying his own property, the Statute has, it is conceived, no application at all; but as soon as a partnership is dissolved, or there is any exclusion of one partner by others, the case is very different and the Statute begins to run." The same learned author, on the authority of *Pearce v. Lindsay*(3) says that a dissolution of a partnership at will may be inferred from circumstances, *e.g.*, a quarrel, although no notice to dissolve may have been given (Lindley on 'Partnership,' 5th edition, page 572). Having regard to the above authorities and clauses 7 and 8 of section 253 of the Indian Contract Act, it is impossible to accede to the contention of the learned Advocate-General that there has yet been no dissolution of the alleged partnership between the plaintiff and the first defendant and that therefore the suit is not barred by article 146 of the Indian Limitation Act. In support of this contention, he strongly relied upon the recent decision of the Privy Council in *Moung Tha Hnym v. Mah Them Myah*(4). In that case, however, no plea of limitation was raised, but the defence relied upon was that the plaintiff, who was admittedly a partner in the business, abandoned all his right, title and interest in the partnership business, and his share in the

(1) L.R., 5 H.L., 656.

(2) 3 De. G.J. & Sm., p. 139.

(3) L.R., 27 I.A., 189; I.L.R., 28 Cal., 53, at p. 59.

(4) L.R., 10 Ch D., 3 at p. 39.

concern and was therefore not entitled to sue for an account. It was found by both the Indian Courts that there was no dissolution and that the plaintiff did not abandon his interest in the partnership. It is impossible to gather from the report, whether, upon the facts of the case, the plea of limitation could have been taken, though as a matter of fact it was not taken in any of the Courts. At page 59 their Lordships of the Privy Council observe as follows:—"There was, however, no more evidence of express abandonment than of consent and there was some evidence of the plaintiff's subsequent intervention in the partnership affairs." If such subsequent intervention was within three years before the date of the suit, there could be no foundation whatever for raising a plea of limitation. The whole judgment and the English authorities cited by Counsel in argument and in the judgment of the Privy Council clearly show that the question of limitation was not at all before their Lordships and that the decision proceeded on the ground that "there has been no abandonment on the part of the plaintiff or loss of his interest in the partnership by laches." In the present case, if there was a partnership between the brothers, it cannot be, and is not, contended that the plaintiff abandoned his interest therein until its termination but only that his right to sue for an account is barred by the Law of Limitation.

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It was further contended by the learned Advocate-General that the three years' period of limitation prescribed by article 106 would be inapplicable to houses and lands purchased by the first defendant from the profits of the partnership. This contention would certainly hold good if it had been alleged and proved that, from time to time, portions of the assets of the partnership were, by the agreement of the partners, withdrawn from the partnership and converted into land or house to be owned by the partners as co-owners (Lindley on 'Partnership,' 5th edition, pages 334 and 335).

In the absence, therefore, of any such allegation and proof, lands and houses bought in the name of one partner and paid for by the firm or from the profits of the partnership business are *prima facie* partnership property. (*Nerot v. Burnand*(1), *Wedderburn v. Wedderburn*(2).)

The case is therefore governed by the ordinary rule that, unless a contrary intention appears by express agreement, or by the

(1) 4 Russ, 247, 2 Bh, (N S.), 215

(2) 22 Beav., 104.

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nature of the transaction, property bought with money belonging to the firm, is deemed to have been bought on account of the firm (*Bank of England Case*(1)).

If the plaintiff's suit on the footing of partnership were sustainable, and the same be not barred by limitation, the remedy he would be entitled to in this suit would be, not to a decree for partition of partnership properties, but to an order for winding up the business of the partnership by sale of its effects, including lands and houses, providing for the payment of its debts, if any, distributing the surplus of the sale proceeds according to the shares of the plaintiff and first defendant respectively.

In my opinion, therefore, the appeal fails and should be dismissed with costs.

Messrs. *Branson & Branson*—Attorneys for appellant.

Messrs. *Grant & Greator*—Attorneys for respondents.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Moore, on reference from Mr. Justice Benson and Mr. Justice Boddam.

1901.
September
27.
October
7, 11, 18.

KICHILAPPA NAICKAR AND ANOTHER (DEFENDANTS),
APPELLANTS,

v.

RAMANUJAM PILLAI (PLAINTIFF), RESPONDENT.*

Limitation Act—Act XV of 1877, s. 5—"Sufficient cause" for not presenting appeal within prescribed period—Interference with exercise of discretion by Appellate Court.

Plaintiff, who had in 1893 been dismissed by the first defendant from his office of karnam, endeavoured to establish his right to the office, in 1894, in the Court of the Deputy Collector, who, in April of that year, dismissed the application and referred plaintiff to a Civil Court. On appeal, the Collector affirmed that decision. In February 1896, plaintiff filed the present suit in the Court of the District Munsif, who, on 29th January 1898, dismissed it, on the ground that his jurisdiction was ousted by the Madras Proprietary Estates' Village Service Act, 1894. He considered that the Collector's Court was the proper tribunal.

(1) 8 D.F. & J., 845.

* Second Appeal No. 444 of 1900 against the decree of E. Cammaran Nayar, Additional Subordinate Judge of Tinnevely, in Appeal Suit No. 192 of 1899, varying the decree of U. Ittinikanda Panikar, District Munsif of Satur, in Original Suit No. 101 of 1896.

Plaintiff applied for copies of the Munsif's judgment and decree on the same day, and received those copies on 18th February 1898. On 5th March 1898 he moved the Deputy Collector, who, on 13th June, rejected his petition. A copy of the latter order was delivered to plaintiff on 14th July 1898, and he preferred an appeal to the Collector on 25th July 1898, which was dismissed on 25th November 1898. A copy of that order was delivered to plaintiff on 7th December 1898, and the records were returned to him on 28th December 1898. On 4th January 1899, plaintiff preferred an appeal to the Subordinate Court against the Munsif's order of 29th January 1898. The Subordinate Judge admitted the appeal as he considered that the proceedings which plaintiff had taken before the Deputy Collector and Collector had been *bonâ fide* and that his failure to appeal against the Munsif's order within the time allowed by law was in consequence of his having pursued the remedy which had been pointed out by the Munsif as the proper one. On its being contended, on second appeal, that the Subordinate Judge ought not to have admitted the appeal to him under section 5 of the Limitation Act:

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Held, (BENSON, J., dissenting), that the appeal ought not to have been admitted.

Held, per curiam, that a mere difference in view on the part of the High Court, as to the mode in which the discretion conferred by section 5 of the Limitation Act ought to have been exercised by the lower Appellate Court in admitting an appeal, is in itself no ground of interference by the High Court.

Per Sir ARNOLD WHITE, C.J., (MOORE, J., concurring):—The test is,—Has the discretion been exercised after appreciation and consideration of all the facts which are material for the purpose of enabling the Judge to exercise a judicial discretion and after the application of the right principle to those facts? If a discretion is exercised under these conditions and a certain conclusion is arrived at, that conclusion is an exercise of discretion judicially sound though an appellate tribunal might be disposed to draw a different inference from the facts. The Subordinate Judge had not considered all the facts which were material for the exercise of judicial discretion, and if he did consider them he had applied a wrong principle. The material question was whether the appellant had been diligent during the period of delay,—not whether he had been misled by the Munsif, or whether his proceedings before the Collector were *bonâ fide*.

Per BENSON, J.:—There is a wide distinction between the law of limitation in respect of suits and in respect of appeals. The "sufficient cause," (referred to in section 5 of the Limitation Act), apparently means not only those circumstances which are expressly recognized as extending time, but also such circumstances as are not expressly recognized, but which may appear to the Court to be reasonable.

Suit for a declaration that plaintiff was entitled to the offices of karnam in certain villages, and for recovery of those offices and their emoluments. Prior to filing this suit, plaintiff had applied to the Deputy Collector, who dismissed his application and referred him to a Civil Court. The Collector, on appeal, upheld that decision. Plaintiff now filed his suit in the Court of the District Munsif, who, on 29th January 1898, dismissed it on the ground that his jurisdiction was ousted by the Madras Proprietary Estates'

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Village Service Act II of 1894 The Munsif held that the Collector's Court was the proper tribunal Plaintiff, on the same day, applied for copies of the Munsif's judgment and decree, these being delivered on 18th February 1898 On 6th March 1898, plaintiff moved the Deputy Collector, who, on 13th June, rejected his petition. A copy of this order was received on 14th July 1898, and plaintiff appealed, on 25th July 1898, to the Collector, who dismissed his appeal on 25th November 1898. Plaintiff received a copy of that order on 7th December 1898, and the records were returned to him on 28th December 1898 On 4th January 1899, plaintiff presented an appeal to the Subordinate Court against the Munsif's decree of 29th January 1898. The Subordinate Judge took the foregoing facts into consideration and admitted the appeal, regarding the proceedings which plaintiff had taken before the Deputy Collector and Collector as having been taken *bonâ fide* and considering that the plaintiff's failure to appeal against the Munsif's decree within the time allowed by law was in consequence of his having pursued the remedy pointed out by the Munsif as the proper one.

Defendants preferred this second appeal, and contended, *inter alia*, that the lower Appellate Court had erred in admitting the appeal, inasmuch as the facts relied on by plaintiff did not constitute "sufficient cause" within the meaning of section 5 of the Limitation Act.

Ramachandra Rao Saheb, V. C. Seshachariar, and R. Kuppusami Ayyar for appellants.

Sivasami Ayyar for *V. C. Desikachariar* for respondent.

The case first came on for hearing before BENSON and BODDAM, JJ., who delivered the following judgments:—

BENSON, J :—The first ground of second appeal taken before us is that the Subordinate Judge ought not to have admitted the appeal to him under section 5 of the Limitation Act.

In 1893 the plaintiff was dismissed by the zamindar (first defendant) from his office of karnam in his zamindari. In 1894 he endeavoured to establish his right to the office before the Deputy Collector and the Collector, but he was referred by them to the Civil Courts He accordingly filed the present suit for a declaration and for recovery of the office and of the emoluments of the office before the District Munsif, who dismissed the suit on 29th January 1898 on the ground that section 3 of Madras Act II

of 1894 ousted his jurisdiction. The plaintiff applied for copy of judgment and decree on the same day, and copies were delivered to him on 18th February. Agreeably to Act II of 1894, on which the District Munsif relied, the plaintiff moved the Deputy Collector on 5th March 1898 and his petition was rejected on 13th June. The plaintiff got copy of that order on 14th July and appealed to the Collector on 25th July. The Collector rejected the appeal on 25th November. He obtained copy of the Collector's order on 7th December and the return of records on 28th December. These dates are not disputed. The plaintiff presented his appeal to the District Court on 4th January 1899. After stating the facts as above the Subordinate Judge expressed his belief that the proceedings taken by the plaintiff before the Deputy Collector and Collector were taken *bonâ fide* and that his failure to appeal against the District Munsif's order within the time allowed by law was in consequence of his pursuing the remedy pointed out by the District Munsif as the proper remedy. The Subordinate Judge found that, under the circumstances, there was sufficient cause shown for admitting the appeal, and the first question for our decision is whether we ought in second appeal to set aside that finding and dismiss the plaintiff's appeal to the Subordinate Judge. I do not think that we ought. It will be seen that the case is a somewhat peculiar one. The Revenue Courts had referred the plaintiff to the Civil Courts and when plaintiff sued in the Civil Court the District Munsif declined jurisdiction. In this the District Munsif was wrong, as pointed out by the Subordinate Judge. However, the plaintiff, acting on the ruling of the District Munsif, again applied to the Revenue Courts and on the 25th November 1898 the Collector referred the plaintiff again to the Civil Court. The plaintiff obtained a copy of the Collector's order on the 7th December, and filed his appeal against the District Munsif's order in less than a month after that date notwithstanding the intervention of the Christmas holidays.

This Court has always shown an inclination to construe section 5 of the Limitation Act liberally. The High Court of Bombay (*Sitaram Paraji v Nimbavalad Harishet*(1)) has no doubt held that a mistake of law is not a "sufficient cause" within the meaning of section 5, and Mahmood, J., concurred in that opinion in *Bechi v.*

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(1) I.L.B., 12 Bom., 320.

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Ahsanullah Khan(1), but this Court (following *Huro Chunder Roy Surnamoyi*(2)), has expressly held that under certain circumstances a mistake of law may be sufficient and that "the true rule is whether under the special circumstances of each case the appellant acted under an honest though mistaken belief formed with due care and attention. Section 14 of the Limitation Act indicates that the Legislature intended to show indulgence to a party acting *bonâ fide* under a mistake." *Krishna v. Chathappan*(3). It is, I think, clear that up to the 25th November the plaintiff was pursuing the remedy indicated to him by the District Munsif with diligence and *bonâ fides*. It is, however, contended that after the Collector's order of the 25th November, the plaintiff ought at once to have filed his appeal against the decree of the District Munsif, and that there was no need for him to get a copy of the Collector's order or the return of the records from the Collector before doing so. If the appellant had been appealing against the order of the Collector he would have been entitled, as of strict right under section 12 of the Act, to deduct the time requisite for obtaining a copy of that order. He was not, however, appealing against that order, and it was therefore not necessary for him to get a copy of that order, but considering the conflict between the various authorities and the real difficulty surrounding the question, it seems to me that it was a natural and reasonable thing for the plaintiff to arm himself with these papers before seeking further legal advice and filing his appeal. It must be observed that there is a wide distinction between the law of limitation in respect of suits and in respect of appeals. In the case of the former the rules are rigid and are laid down with exactness, nothing being left to the discretion of the Court. But in the case of appeals section 5 gives the Court a discretion to admit the appeal after the prescribed time if the appellant "satisfies the Court that he had sufficient cause for not presenting the appeal" within the prescribed period. "Sufficient cause" is evidently something more than "legally sufficient" or "sufficient according to the rules laid down in the law of limitation"; for if any case fell within these rules it would be governed thereby, as in the case of suits, and there would be no scope for the application of section 5. "Sufficient cause"

(1) I.L.R., 12 All., 461 at p. 485.

(2) I.L.R., 13 Cal., 266.

(3) I.L.R., 13 Mad., 269.

seems to mean not only those circumstances (such as the Courts being closed, or time being spent in obtaining copies, or the party being a minor or insane) which the law expressly recognizes as extending the time but also such circumstances as are not expressly recognized but which may appear to the Court to be reasonable, looking to all the facts of the case. In the case already referred to (*Krishna v. Chathappan*(1)) the late Chief Justice and Muttusami Ayyar, J., construed the section in these words:—"We think that section 5 gives the Courts a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words 'sufficient cause' receiving a liberal construction so as to advance substantial justice when no negligence, nor inaction, nor want of *bona fides* is imputed to the appellant." I do not think that in this case negligence or inaction or want of *bona fides* can fairly be imputed to the appellant, and substantial justice undoubtedly requires that the District Munsif's order should be reversed. Moreover, this matter comes before us in second appeal and in my judgment, we ought not to set aside the decision of the Court below in a matter within its discretion, unless it has failed to exercise any discretion at all, or has exercised it in a manner that is clearly wrong. This was well laid down by Mahmood, J., in *Bechr v. Ahsanullah Khan*(2) and his judgment was concurred in by the Full Bench. Dealing with the very question now before us as to section 5 he said:—"This, then, is the exact scope of the rule laid down by the learned Chief Justice in that case; it does not repudiate the jurisdiction of the second Appellate Court to interfere, but points out that, when discretion has been actually exercised, it must not, upon light grounds and in the absence of strong reasons, be disturbed in appeal. In the principle thus expressed I fully concur, because, in matters of this kind, as indeed in matters of conclusions on the weight of evidence, the Appellate Court should always act cautiously and not disturb findings of the lower Court, unless it is absolutely satisfied that the conclusions at which the lower Court arrived were erroneous."

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It has been suggested that the Subordinate Judge did not exercise a real discretion or bring his mind to bear on the interval between the Collector's order on the 25th November and the

(1) I.L.R., 13 Mad., 269.

(2) I.L.R., 12 All., 461 at p. 485.

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filing of the appeal on the 4th January, but I do not think that this plea can be sustained. He refers to the plaintiff getting the copy of the Collector's order on the 7th December and the return of the records on the 28th December; and I do not think that, in the face of this, we have any ground for saying that he did not apply his mind to this interval as well as to the time before the 25th November. In this case I would adopt the words used in another case under this same section 5 (*Parvati v. Ganpati*(1)), and say that I cannot hold that the Subordinate Judge "acted capriciously or arbitrarily or not in accordance with the rules of reason or justice; or that he came to his decision without any proper legal material to support it, or that his discretion was not exercised within the limits to which an honest man, competent to the discharge of his office, ought to confine himself, or that there was, in fact, no real judgment exercised in the matter." The lower Appellate Court exercised its discretion so as to advance substantial justice and I certainly cannot say that (to adopt the test of the Allahabad High Court already quoted) I am "absolutely satisfied that the conclusions at which it arrived were erroneous." I would therefore in this second appeal decline to interfere with the Subordinate Judge's discretion in having admitted the appeal.

As regards the second question, viz., in what Court does the plaintiff's suit lie, I am of opinion that the Subordinate Judge has taken the correct view. The suit is one under section 11 of Regulation XXV of 1802. That Regulation was in force until the notification of Government was issued in 1897, bringing Act II of 1894 into force. The present suit, which was filed in 1896, therefore, was not brought under Act II of 1894 or Act III of 1895; and the District Munsif was wrong in supposing that his jurisdiction was ousted by Act II of 1894.

I would therefore dismiss this second appeal with costs.

BODDAM, J.—In this second appeal two questions were raised before us by the appellants—(1) Whether the appeal was rightly admitted, and (2) Whether the Subordinate Judge was right in holding that the District Munsif had no jurisdiction to hear the suit.

Upon the second question we are agreed that the Subordinate Judge was right in holding that the District Munsif had no

(1) I L.R., 23 Bom, 513.

jurisdiction to hear the suit as the suit was for satisfaction for wrongful dismissal under Regulation XXV, section 11, and was not brought under Regulation XXIX, section 7, as in *Jagannatha Pillai v Subbaraya Pillai* (1). So far, therefore, as this question is concerned, I agree that the appeal should be dismissed with costs.

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Upon the first question raised, I regret that I am unable to agree with my learned colleague.

The question turns upon the interpretation to be put upon sections 4 and 5 of the Limitation Act (Act XV of 1877) and more particularly upon the meaning of the second clause of section 5. The material part of that clause is as follows:—"Any appeal . . . may be admitted after the period of limitation prescribed therefor when the appellant . . . satisfies the Court that he had sufficient cause for not presenting the appeal . . . within such period" The period allowed for an appeal under the Limitation Act is 30 days. In this case the appeal was presented on the 4th January 1899 from a decree dated the 29th January 1898. The question before us is whether the lower Appellate Court was right—or rather was justified in the circumstances—in admitting the appeal under section 5.

The suit was to establish the appellant's (the plaintiff's) right to the office of karnam from which he had been dismissed by the first respondent (first defendant) in 1893, the second respondent (second defendant) being appointed in his place. In 1894 the plaintiff brought his action before the Deputy Collector in the Revenue Court, and in April 1894 his suit was dismissed and he was referred to a Civil Court. He appealed to the Collector who dismissed his appeal and affirmed the decision of the Deputy Collector. In February 1896 he brought his action in the Court of the District Munsif and on the 29th January 1898 the District Munsif dismissed his suit, holding that the Revenue Court was the proper tribunal. The appeal now in question is from this decree of the District Munsif.

The plaintiff (though it was entirely unnecessary to do so) applied at once for a copy of the District Munsif's judgment and decree, which he obtained on the 18th February, and on the 5th March he presented his petition to the Deputy Collector, which was rejected on the 13th June. On the 14th July he got a copy

(1) I L.R., 22 Mad., 340.

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of that order and on the 25th July appealed to the Collector. The Collector dismissed his appeal on the 25th November. He obtained a copy of the Collector's order on the 7th December and the return of the records on the 28th December. On the 4th January 1899 he presented his appeal to the District Court from the decree of the District Munsif, dated the 29th January 1898.

In his judgment in this appeal the Subordinate Judge says;—
“It appears to me that the plaintiff lost his time in following the course pointed out by the District Munsif in his judgment and I believe the proceedings he was taking before the Deputy Collector and the Collector were *bonâ fide*. Under the circumstances I find that sufficient cause was shown for admitting the appeal.”

The question now to be determined is whether we can, or should, in the circumstances, interfere in second appeal, or whether the facts justify us in holding that the Subordinate Judge has exercised his judicial discretion and whether there were any sufficient legal materials to support his finding. I quite agree that it is right and proper that section 5 should be liberally interpreted (*Krishna v. Chathappan*(1)). I also agree that the mere fact that the Court above would have come to a different conclusion is no sufficient ground *per se* for interference. (*Parnati v. Ganpati*(2); and *Fatima Begam v. Hansi*(3)—but this case has been practically overruled, (*Bechi v. Ahsanullah Khan*(4)). The duty of the second Appellate Court and the interpretation of section 5 of the Limitation Act has been laid down in the judgment of Mahmood, J., in the Full Bench case, *Bechi v. Ahsanullah Khan*(4). This case overrules *Fatima Begam v. Hansi*(3). The reference was by Edge, C.J. and Young, J., because of “their doubts as to the accuracy of the ruling of this Court in” that case and Edge, C.J., was a member of the Court in both cases. He says in *Bechi v. Ahsanullah Khan*(4), with reference to *Fatima Begam v. Hansi*(3):—
“I need only say that I am now, and have long been satisfied, that, on the facts of that case Mr. Justice Oldfield and I ought to have given effect to the objection that the appeal, when it was admitted by the District Judge of Allahabad, was improperly admitted, no sufficient cause having been made out for the delay” In his judgment (with which all the other Judges agree) Mahmood, J.,

(1) I L R, 13 Mad, 269.

(3) I L R, 9 All., 244

(2) I L R, 23 Bom, 513.

(4) I L R, 12 All., 461, at pp. 488, 484, 492.

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says:—"It seems to me . . . that it is the duty of the second Appellate Court to see whether the duty . . . cast upon the Judge of the lower Appellate Court has been properly discharged by him, and to interfere, if by a wrong, improper and judicially unsound exercise of discretion under section 5 of the Act, he has admitted an appeal which was barred by limitation. To hold otherwise would be to confer an amount of finality and conclusiveness upon the adjudications of District Judges in this respect that the law could never have intended; for the logical result of such a view would be to paralyse the hands of this Court, even in a case where the lower Appellate Court, by a grossly improper and unsound exercise of discretion under section 5 of the Act had admitted, and heard, and determined an appeal which had for a century or more been barred by limitation. What would, under such circumstances, become of the laws of limitation which have justly been denominated as 'statutes of repose'? I cannot but hold that the imperative requirements of section 4 of the Limitation Act not only justify us, but require us, as a Court of second appeal, to satisfy ourselves whether the Appellate Court has properly applied the provisions of section 5 of that enactment, and, if the discretion has been wrongly exercised, to undo its effects by interference in second appeal . . ." He then proceeds to deal with the principles enunciated and the decision of the Court in *Fatima Begam v. Hansi* (1) and says:—"According to my view of that case, I should have held that the District Judge had exercised an improper discretion in admitting the appeal after limitation, and I should by my decree have undone the effects of such wrong admission of the appeal" (*Bechu v. Ahsanullah Khan* (2)).

I have quoted this judgment at some length because it expresses my view of the duty of this Court and of the proper mode of dealing with a case such as this.

Turning now to the facts again. Between the date of the decree appealed from (29th January 1898) and the petition to the Deputy Collector (5th March) 35 days elapsed and, apart from section 5, Limitation Act, the appeal was barred. The copies of the judgment and decree of the District Munsif were not necessary

(1) I.L.R., 9 All., 241

(2) I.L.R., 12 All., 461 at p. 465.

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before the petition to the Revenue Court could have been put in. Nor were they of any avail when it was put in, so the whole of that time was wasted and was not "lost . . . in following the course pointed out by the District Munsif in his judgment' and the fact that the proceedings were *bonâ fide* does not affect the question.

Again, if the whole time actually occupied in *bonâ fide* following the course pointed out by the District Munsif is deducted and the time up to 5th March is included in that phrase, it only applies to the periods between the 29th January and the 27th November (even if the period from the 13th June, when his petition was rejected by the Deputy Collector, to the 25th July, when he appealed to the Collector—a period of 42 days—is to be included): still the period from the 27th November 1898 to the 4th January 1899—a period of 40 days—more than sufficient to bar the appeal—was allowed to elapse and I venture to think that it can hardly be suggested that this was caused by following the course suggested by the District Munsif. All that was the natural consequence of being misled ended on the 25th November 1898. The copy of the order of the Collector was wholly unnecessary and quite useless on an appeal from the Munsif's judgment and I am strongly of opinion that though the Subordinate Judge mentions the fact and the date on which he obtained this copy, he did not apply his mind to the length of time that was allowed to pass after the appeal was dismissed by the Collector and this appeal was entered and the utter futility of waiting to obtain a copy of the Collector's order before putting in the appeal; and if he did, I am of opinion that he has not properly applied the provisions of section 5. To my mind this would be a judicially unsound exercise of discretion, as the discretion would have been exercised wrongly and improperly—for there was no proper legal material to support it—and therefore I think his decision is contrary to law. I say, I think, he has not applied his mind to this period, because he does not refer to it. The only reason he gives for admitting the appeal is that the appellant was misled and therefore took proceedings in the Revenue Courts *bonâ fide*. All these proceedings ended on the 25th November 1898, and he says nothing about the period that elapsed subsequently. All that was done by the appellant after that date was unnecessary and quite foreign to the appeal and the Subordinate Judge does not

say anything which leads me to think that he intended to excuse it. If he did intend to excuse it I think his decision is wrong and should be reversed. To say that the appellant might have thought it advisable to procure a copy of the Collector's order before entering his appeal and therefore the delay should be excused would be in my view an unsound exercise of judicial discretion, for it has no proper legal material to support it. One would be equally justified in excusing any delay he might think advisable in order to enter his appeal on a "lucky day" or for some other equally untenable reason.

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For these reasons I think this appeal should be allowed, the decree of the Subordinate Judge reversed and the appeal to the lower Appellate Court dismissed with costs in this and in the lower Appellate Court.

The case having been referred to Sir ARNOLD WHITE, C.J., and MOORE, J., under the provisions of section 575 of the Code of Civil Procedure, and having been duly heard, their Lordships delivered the following judgments:—

Sir ARNOLD WHITE, C.J.—In this case the Subordinate Judge admitted an appeal which was out of time. The question for consideration is whether this Court ought, on second appeal, to interfere with the finding of the Subordinate Judge that the appellant had shown "sufficient cause" within the meaning of these words as used in section 5 of the Limitation Act for not presenting his appeal within the prescribed period. The dates and facts are set out in the judgments of Mr. Justice Benson and Mr. Justice Boddam and are not in dispute.

The Subordinate Judge held that the appellant was out of time with his appeal by reason of his following the course pointed out by the District Munsif and that his proceedings before the Deputy Collector and the Collector were *bona fide*. This being so he held that sufficient cause had been shown for admitting the appeal. In other words, he held that the fact that the appellant had made out a case, which, if the question had been whether under section 14 he was entitled to have the time occupied by his proceedings before the Revenue Courts excluded in computing the period of limitation prescribed for his suit, would have entitled him to have the time thus occupied excluded from the computation, was in itself "sufficient cause" within the meaning of

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section 5 for his not presenting his appeal within the prescribed period. Now section 14 of the Act applies in terms to suits and not to appeals. It deals with the computation of time. It does not confer a discretion on the Court, but gives a right to a party to have a certain period of time excluded from the computation of the period of limitation if the requirements of the section are satisfied. This being so, Mr Desikachariar very properly did not contend that the appellant was entitled as of right to 30 days (the prescribed period for appeals) for the presentation of his appeal from the termination of his proceedings in the Revenue Courts. His contention was, first, that the appellant had, in fact and in law, shown sufficient cause for not presenting his appeal within the prescribed period, and, secondly, that in any view, the Subordinate Judge had exercised a judicial discretion in admitting the appeal and that this Court ought not, on second appeal, to interfere with the exercise of this discretion.

Now, although section 14 does not in terms apply to appeals, it, no doubt, indicates that the Legislature intended to show indulgence to a party acting *bonâ fide* under a mistake, and the "equity" of the section may legitimately be taken into consideration in determining whether the discretion conferred by section 5 ought to be exercised in favour of an appellant whose appeal is out of time.

Accepting, as I am prepared to do for the purpose of this judgment, the view of the Subordinate Judge, with regard to the appellant's proceedings before the Revenue Courts, I assume that the appellant showed sufficient cause for not presenting his appeal within the prescribed period, that is, 30 days after 18th February 1898 (the date when he obtained the copy of the judgment of the District Munsif dismissing his suit). Strictly speaking, the first question is not whether the appellant has shown sufficient cause for not presenting his appeal within the prescribed period, but whether he has shown sufficient cause for not presenting his appeal before 4th January 1899. The discretion conferred by section 5 is a discretion—in the words used by Lord Esher in a similar case, (*Cusack v London and North-Western Railway Company*(1)) "which the Court cannot exercise loosely, but which should be exercised on a consideration of the circumstances of

(1) [1891] 1 Q B, 347.

each case as it arises." At the same time I entirely agree that the words "sufficient cause" should receive a liberal construction "so as to advance substantial justice when no negligence, nor inaction nor want of *bona fides* is imputable to the appellant"—(see *Krishna v. Chathappan*(1)).

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If I had had to deal with this question in the first instance, my view would have been that the appellant had failed to show "sufficient cause" for not presenting his appeal until 4th January 1899. The appeal to the District Judge was not presented until 39 days after 25th November 1898, the date of the dismissal of the appeal by the Collector. It seems to me it was entirely unnecessary for the appellant to wait until 28th December, the date when the records were returned by the Collector, before presenting his appeal to the Subordinate Judge, and I cannot adopt the view that he was entitled to wait till 7th December when he obtained a copy of the Collector's order. No doubt if he had been appealing the law would have allowed him in computing the time within which his appeal must be presented to exclude the period requisite for obtaining a copy of the judgment upon which the decree appealed against was founded, but I fail to see how he can pray in aid a provision of law relating to the computation of the time for appeal, which involves no question of discretion but which lays down a hard and fast rule, for the purpose of making out "sufficient cause" for the indulgence for which he asked being granted to him. I presume the object of excluding the time requisite for obtaining a copy of the judgment in computing the period of limitation when a decree is appealed against is to give a party an opportunity for deliberate consideration of the grounds upon which the decree pronounced against him is based before making up his mind as to whether he will appeal. In the present case the appellant had been supplied with a copy of the decree against which he appealed as far back as 18th February 1898, and neither the Collector's order nor the records in the case could tell him anything as regards the decree which he proposed to appeal against which he did not already know. The appellant does not attempt to offer any explanation of the delay of 39 days beyond that contained in paragraph 11 of his petition to the Subordinate Judge. He there states "that

(1) I.L.R., 13 Mad., 269.

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after the receipt of the said appellate order petitioner consulted and took advice as to the course that he should take and he was told to obtain return of the material records from the Revenue Courts in which he has filed them."

Even assuming that the appellant was entitled to wait till he obtained a copy of the Collector's order—7th December—there is no attempt beyond the vague statement in the petition to which I have referred to explain the delay from 7th December to 19th December when the Court closed for the Christmas recess, or to account for the fact that the appeal was not presented on the day of the re-opening of the Court. If what I have termed the "equity" of section 14 is applied to this case, I think the appellant was not entitled to the indulgence for which he asked, because he gave no reason and offered no explanation to account for his not having shown "due diligence" during the period which elapsed between 25th November 1898 and 4th January 1899, or at any rate between 7th December and 4th January. If the proposition laid down by this Court in *Krishna v. Chathappan*(1) is applied, I think the appellant was not entitled to the indulgence for which he asked, because he failed to show that there had been "no negligence, nor inaction on his part" during the period above referred to. For every day's delay after 25th November, or at any rate after 7th December, the onus lay on the appellant to justify or explain. He has made no attempt to discharge this onus. I am not called upon to say that a delay of a given number of days would not have disentitled the appellant to the indulgence for which he asked and that a delay of a given number of days would have disentitled him. All I say is that, on the admitted facts in this case, there is a delay which remains unexplained. That being so, I should have declined to admit the appeal.

There remains, however, a further question for consideration. Ought we, in second appeal, to interfere with the finding of the Subordinate Judge? So far as I can gather from reported cases the principles applicable to the determination of this question have not been so fully considered by this Court as by the other High Courts. See, for instance *Beehi v. Ahsanullah Khan*(2) and *Parvati v. Ganpati*(3). In fact it would almost seem as if

(1) I.L.R., 18 Mad., 269

(2) I.L.R., 12 All., 461

(3) I.L.R., 23 Bom., 513.

the rule which has been followed in this Court has been that the mere fact that the view of the Court as to the sufficiency of the cause for not presenting the appeal in time differs from that of the lower Appellate Court justifies the interference of this Court in second appeal. See, for instance, the judgment of this Court in *Krishna Bhatta v. Subraya*(1). In my opinion (and Benson and Boddam, JJ., agree as to this) a mere difference in view as to the mode in which the discretion conferred by the section ought to have been exercised is in itself no ground for interference. It seems to me that before this Court interferes it ought to be satisfied that the exercise of the discretion was judicially unsound. The test is, has the discretion been exercised after appreciation and consideration of all the facts which are material for the purpose of enabling the Judge to exercise a judicial discretion and after the application of the right principle to these facts? If a discretion is exercised under these conditions and a certain conclusion is arrived at, that conclusion, it seems to me, would be an exercise of discretion judicially sound, though an appellate tribunal might be disposed to draw a different inference from the facts.

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Now, the first point which the Subordinate Judge had to decide in this case was whether the appellant had shown sufficient cause for not presenting his appeal within thirty days of 18th February 1898. Having satisfied himself as to this, the next point he had to consider was whether he had shown sufficient cause for not presenting his appeal until 4th January 1899.

No doubt the fact that the appeal was not presented till 4th January 1899 was present to his mind; but can it be said that the Judge considered the question of the appellant's conduct between the time when his appeal to the Collector was dismissed and his appeal to the Subordinate Judge was presented, or if he did consider this question, can it be said that he applied the right principle in exercising his discretionary powers? The Subordinate Judge admitted the appeal, as he says expressly in his judgment, because the appellant "lost his time" in following out the course pointed out by the District Munsif and because his proceedings before the Collector and the Deputy Collector were *bonâ fide*. This may have been a very good reason for holding that the appeal ought to have been admitted notwithstanding that it was

(1) I.L.R., 21 Mad., 228.

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not presented until some date subsequent to 25th November 1898. It is no reason for holding that it ought to be admitted notwithstanding it was not presented till 4th January 1899. If it appeared that the Judge has considered the conduct of the appellant during the period subsequent to 25th November and had come to the conclusion, upon the evidence, that in the circumstances of the case the appellant had shown "due diligence," or in the words used by the Judges of this Court in *Krishna v. Chathappan*(1) that "there had been no negligence nor inaction on his part," I think his conclusion as an exercise of his discretion would have been judicially sound, and that, even if we did not agree with it, we ought not to interfere. It seems to me that the Judge did not consider all the facts which were material for him to exercise a judicial discretion, viz., the facts in connection with the period referred to, and that if he did consider these facts he applied the wrong principle. The question he ought to have asked himself was—was the appellant diligent during this period? The question which he appears to have asked himself was—was the appellant misled by the Munsif and were his proceedings before the Revenue Courts *bonâ fide*?

I think this appeal ought to be allowed on the ground that the appellant's appeal to the lower Appellate Court was time-barred.

MOORE, J.—I concur.

This appeal is allowed and the decree of the Additional Subordinate Judge's Court is set aside with costs in this Court and in the lower Appellate Court.

(1) I.L.R., 13 Mad., 269.

APPELLATE CIVIL.

*Before Sir Arnold White, Chief Justice, and Mr. Justice
Bhashyam Ayyangar.*

ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE
COMPANY, LIMITED, (DEFENDANTS), APPELLANTS,

1901.
September
25, 26, 27, 30.
October.
1, 17.

v.

NARASIMHA CHARI (PLAINTIFF), RESPONDENT.*

*Insurance—Policy of Life Insurance—Warranty—Age of assured—Mis-statement of
age—Onus of proof—Contract Act—Act IX of 1872, s. 65—Return of premium
paid on policy subsequently held void—Evidence Act—Act I of 1872, s. 32 (5)—
Statement as to age of a member of a family by another member since deceased—
Admissibility.*

In August 1898, V signed a proposal form addressed to the defendant company for a policy of insurance for a sum of money payable at his death. In it V gave the date of his birth as corresponding to 7th August 1840, and stated that he would be fifty-eight next birth-day and declared that the particulars given therein were correct. On or about the same date V also signed a "personal statement," which, after answering numerous questions, concluded with the following declaration—"I . . . do solemnly declare that according to the best of my knowledge and belief I am now in good health . . . and that my age does not exceed fifty-eight years . . . and that I have fully and faithfully answered all such questions as have been put to me in the form of proposal and by the medical referee relative to my habits, constitution and general state of health without concealment or reservation of any kind, . . . and I hereby covenant and agree that this declaration shall be the basis of the contract between myself and the company, and if any untrue averment be contained herein or if any of the facts required to be set forth in the proposal and in the medical examination be not truly stated, all moneys which shall have been paid upon account of the assurance made in consequence hereof shall be forfeited and the assurance itself be absolutely null and void."

In September 1898, the defendant company issued a policy for the sum proposed for, which recited that V had delivered a statement in writing declaring, *inter alia*, that his age on his next birth-day would not exceed fifty-eight years, and contained the proviso that the policy was issued upon the express condition that in case any statement or allegation contained in that declaration should be untrue, or if the assurance thereby made should have been made through any misrepresentation or concealment, the policy should be void.

In September 1899 V died, and plaintiff, his nephew, claimed from defendants the amount due under the policy. Defendants refused to pay on the ground, *inter alia*, that the policy had been obtained by fraudulent misrepresentations as

* Original Side Appeal No. 6 of 1901 against the decree of Mr. Justice Boddam in Civil Suit No. 138 of 1900.

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to the age, means and circumstances of the assured. The evidence showed that the age of the assured was from three to four years greater than he had declared it to be :

Held, that the defendants were not liable on the policy.

Held also, that the plaintiff was not entitled, under section 65 of the Contract Act, to a refund of premia paid on the policy during the lifetime of the assured.

In the "personal statement" referred to the assured had omitted to disclose the fact that two sisters had predeceased him. In reply to a question as to whether any brother or sister had died, and if so of what diseases and at what ages, the assured had stated that a brother had died at the age of seventy-seven years. It now appeared that two sisters had also died at a date previous to that of the statement :

Held, that the policy was not rendered void by this omission.

Per Sir ARNOLD WHITE, C.J. :—The declaration contained in the "personal statement" being ambiguous should be construed in favour of the assured, and amounted only to a warranty that the age of the assured was fifty-eight to the best of his knowledge and belief ; but this statement of age by the assured was, in fact, an untrue statement and untrue to his knowledge and belief. The statement was in the nature of a warranty and formed part of the contract, and in consequence plaintiff was not entitled to recover on the policy.

Per BHASHYAM AYYANGAR, J. :—The assured had given a warranty which, in a case of insurance, operated as a condition precedent to the attaching of any risk under the policy, that every statement and allegation contained in the declaration was substantially and in fact true, and the question for the Court to consider was, not the materiality or otherwise of that statement, but its truth. The clause in the personal statement relating to the "knowledge and belief" of the assured did not qualify the warranty there given ; there was no real ambiguity, and, in consequence, the warranty as to age was an absolute one and not merely a warranty of his belief as to his age.

Also : that a statement as to plaintiff's age, made by his sister, was admissible in evidence after her decease, under section 32 (5) of the Evidence Act, the date of birth being the commencement of a relationship by blood, and therefore relating to the existence of such relationship within the meaning of the section. *Ram Chandra Dutt v. Jogeswar Narain Deo*, (I.L.R., 20 Cal., 758), followed.

The defendant company's prospectus contained a condition that evidence of age of an assured would be required to be furnished in every case before a claim under a policy would be paid ; and recommended assurers to provide evidence of age as soon as possible as it was required on settlement of claim if not previously produced.

Semle : that the effect of the condition was to throw upon the assured or his representatives the onus of proving the correctness of the age as warranted by the assured.

Also : that it was unnecessary to prove that the company's prospectus had been read by or specially brought to the notice of the assured, apart from the reference made to it in the policy (which was expressed to be issued subject to the regulations and conditions comprised in the prospectus.) *Watkins v. Rymil*, (L.R., 10 Q.B.D., 178), followed.

The Oriental Government Security Life Assurance Company, Limited, v. Sarat Chandra Chatterji, (I.L.R., 20 Bom., 99), referred to.

SUIT to recover money on a policy of life insurance. The plaintiff stated that the deceased, C. Venkatachari, had insured his life with the defendant company for Rs. 6,000, upon terms mentioned in a certain policy of insurance; that at the time when the insurance was effected the deceased named plaintiff, his nephew, as his nominee to receive the benefit of it when the same should become payable; that all premiums had been regularly paid down to the date of the death of the assured; that the assured died on or about 27th September 1899, and that though notice of his death and proof thereof had been given the defendants neglected and refused without any valid ground to pay the amount due under the policy or any part thereof. Defendants in their written statement admitted the policy of insurance, but alleged that it had been effected for speculative purposes by plaintiff who had no interest in the life of the assured, and that it amounted to a wagering contract and was void; that it had been obtained by fraudulent misrepresentations as to the age of the assured, and as to his means and circumstances, and was not binding on the company; and that they were not liable under it. A further written statement was filed, alleging that statements in the personal statement of the assured to the effect that he had never suffered from any disease and had never had any medical attendant, were false; and contending that the policy was, by reason of such misrepresentations, not binding on the company, and that the company were not liable thereunder. The policy of insurance, which bore date 28th September 1898, after reciting the amount assured, premium, &c., and that the assured "had delivered a statement in writing, signed by himself, the said assured, and bearing date the 6th day of August 1898, thereby declaring that the age of the said assured on his next birth-day will not exceed fifty-eight years, and setting forth the past and present state of health, and other circumstances touching the habits and life of the said assured, which declaration and relative personal statement made to the medical referee of the company the said assured hath agreed shall be the basis of the contract between him and the said company;" and that the premium had been paid; witnessed, *inter alia*, that on the death of the assured, (the premiums having been duly paid), "the said company shall be subject and liable to pay to the executors, administrators, or assigns of the said assured immediately after proof to the reasonable

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satisfaction of the directors of the death of the said assured shall have been received at the office of the said company" the amount assured. The policy contained the two provisos following:—

Provided always, and these presents are upon this express condition, that in case any statement or allegation contained in the declaration hereinbefore mentioned be untrue, or if the assurance hereby made shall have been made through any misrepresentation, concealment, or untrue averment whatsoever, or in case the said assured shall, within twelve calendar months after the date hereof, commit suicide, this policy shall be void, and all moneys paid in respect thereof shall be forfeited to the company, but in case of death by such suicide, as aforesaid, if the policy shall have been assigned *bond fide* for a valuable consideration, shall, immediately after the date of such assignment, be valid to the extent of the interest of the assignee thereunder; but if the policy is unassigned, all moneys paid as premiums in respect thereof shall be paid to those to whom the insurance money would, but for such lapse, have been payable.

Provided also that the assurance hereby made shall, at all times and under all circumstances, be subject to the regulations and conditions comprised in the company's prospectus, dated 1st July 189

The company's prospectus, referred to in the policy, contained the following (among other) information:—"That all claims will be paid immediately after proof of death and title have been produced to the satisfaction of the Directors" . . . "That evidence of age is required to be furnished in every case before the claim under a policy can be paid. Any of the following proofs will be accepted." . . . "In the event of none of the abovementioned records being procurable, the directors sometimes admit age on being furnished with an extract from the assured's service register verified by the superior officer, but failing this the assured should submit a declaration by a relative or friend, in form given at page 43, . . . signed before a justice of the peace or a Magistrate, and if the directors consider it to be quite satisfactory they will admit age. The directors do not withhold the issue of a policy until age has been proved, but recommend assurers to produce evidence of age as soon as possible, as it is required on settlement of claim if not previously produced."

The proposal which was dated 6th August 1898, (filed as exhibit I), contained answers to nine questions. In it the assured gave the date of birth as 25th of Adi, Sarvari, (corresponding to 7th August 1840), and stated that he would be fifty-eight next

birth-day. The document ended with the following declaration signed by the assured:—"I, the undersigned, do hereby declare that the whole particulars of the proposal written above are correct."

A "personal statement," dated 6th August 1898, (though, apparently, signed on 8th August 1898, and filed as exhibit I (a)), contained the following (among other) questions and answers:—
 "Q. 9(a) Are your father and mother alive? If dead:—A. Father died, aged 82 years. Mother died, aged 76 years. Q. 10(a) Have your brothers and sisters been healthy? A Yes. Q. 10(b) How many are now living and at what ages? A One sister at 88 years of age. Q 10(c) If any died, of what diseases and at what ages did they die? A. Brother died at 70 years of age."

The document ended with the following declaration, signed and declared by the assured, before the medical referee:—

I, the undersigned Chelrama Venkatachariar, do solemnly declare *

* This declaration to be read over and also signed in the presence of medical referee

that, according to the best of my knowledge and belief, I am now in good health and have had the small-pox and have not laboured under insanity, fits, rupture, gout or disease of the lungs or suffered from constitutional syphilis or other organic disease or infirmity whereby my constitution has been impaired and that my age does not exceed fifty-eight years, that I have passed fifty-eight years or thereabouts in India and that I have fully and faithfully answered all such questions as have been put to me in the form of proposal, and by Doctor † , medical referee, relative to my habits, constitution and general state of health, without concealment or reservation of any kind And I

† Name of medical officer to be given in full.

hereby covenant and agree, that this declaration shall be the basis of the contract between myself and the company and if any untrue averment be contained herein or if any of the facts required to be set forth in the proposal and in the medical examination be not truly stated, all moneys which shall have been paid upon account of the assurance made in consequence hereof shall be forfeited and the assurance itself be absolutely null and void.

The following issues were framed:—"1. Whether the policy was effected for the benefit of the plaintiff and his wife and children? 2 Whether the alleged interest of the plaintiff is sufficient to support the action? 3. Whether Venkatachari was the undivided brother of the plaintiff's father? 4. Whether the policy

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was obtained by means of misrepresentation as to the age, health, means or circumstances of the said Venkatachari, as alleged in the written statement and in the [further written statement]."

The material portions of other documents and of the evidence are set out in the judgments.

The Court decreed in favour of the plaintiff.

Defendants preferred this appeal.

Hon'ble Mr. *Eardley Norton* and Mr. *J. H. M. Ryan* for appellants.—The policy is void, as there has been misrepresentation as to the age, health and circumstances of the assured, and there was no disclosure of the fact that his two sisters had died when the personal statement was made. The date of birth is given as 25th Adi, Sarvari, corresponding to 7th August 1840, and the age as fifty-eight next birth-day, which corresponds with 25th Adi of Sarvari. This specific statement raises the presumption that the assured knew his age and had means of proving it. The company has not admitted the age in this case, and it is submitted that the onus lies on plaintiff, before he can recover, to show that his statement was correct. That onus has not been discharged. The policy recites that the statement signed by the assured shall be the basis of the contract. That statement contains representations that the father of the assured died at the age of eighty-two, his mother at the age of seventy-six, a sister at the age of eighty-eight, and a brother at the age of seventy. It now transpires that two other sisters had died at the date when that statement was made though there is no disclosure of that fact. That is a concealment. He was bound to disclose facts relating to all his brothers and sisters. If the fact of the death of the two sisters had been known the cause of their deaths might have been ascertained and the policy might never have been granted. The declaration is limited to "knowledge and belief" only so far as the first portion is concerned. The declaration as to age is absolute, as is shown by the use of the words "and that my age does not exceed fifty-eight years" The last paragraph expressly declares that "this declaration shall be the basis of the contract." So this statement contains the terms, and these are converted into a warranty by the policy. Being a warranty, it is contended that the concealment of the death of the two sisters is material, whether intentional or not. The declaration that all the questions have been "faithfully answered" is a warranty

and not limited to knowledge and belief. There have been mis-statements with regard to (1) age, (2) sisters, (3) medical attendant, and (4) health. The authorities show that in such circumstances defendants are justified in refusing to pay on the policy. *The Oriental Government Security Life Assurance Company, Limited, v. Sarat Chundra Chatterji*(1) was a case against the same company, and the onus of proof of age was held to lie on the plaintiff. The general principle, as stated in *Newcastle Fire Insurance Co. v. Macmorran and Co.*(2), is that it is immaterial whether the representation was a material one or not; it must be exact. In *Anderson v. Fitzgerald*(3), there were two false answers, *ie*, as to relatives having died and as to previous insurance, and the policy was held to be void. Where the representations have been made the basis of the policy, the latter is vitiated on the statements being proved to be false, whether they are material or not, and whether intentionally false or not, so long as they were made in the course of obtaining the policy. In *In re Universal Non-Fariff Fire Insurance Co.*(4), Malins, V. C, states that "the materiality signifies nothing; it is a question of fact"; and refers to *Newcastle Fire Insurance Co. v. Macmorran and Co.*(2) already cited. In *Thomson v. Weems*(5), a policy was held null and void where two questions had been answered falsely and a declaration was made the basis of the contract. See per Lord Blackburn, who remarks, at page 677, that it is unimportant whether the points are material or not, the parties had made them part of their contract and must be taken to have considered them material. Lord Watson also states that the fact that the declaration was made the basis of the contract made it a warranty. In *London Assurance v. Mansel*(6), the effect of concealment is dealt with by Jessel, M. R., at page 369. The fact that the party proposing may have thought a matter immaterial does not affect his position. These cases show that it is material for the company to know the family history of the proposer. In *Cazenove v. The British Equitable Assurance Company*(7) and *Garton v. The Bristol and Exeter Railway Co.*(8), the answer complained of was true in a sense—for the assured said he had been attended by a doctor,

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(1) I.L.R., 20 Bom., 99.

(3) 4 H.L. Cas., 484.

(5) L.R., 9 App. Cas., 671 at p 677

(7) 29 L.J., C.P., 160.

(2) 3 Dow., 255.

(4) L.R., 19 Eq., 485.

(6) L.R., 11 Ch. D., 363 at p. 369.

(8) 6 C.B., N.S., 639.

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but, in fact, he had been attended by three doctors. It was held that the personal statement contained an untrue statement and that the policy was avoided. In *Duckett v. William*(1), it was unsuccessfully contended that the proviso "if any untrue averment be contained herein" meant "untrue to the knowledge of the person making it"; and a similar decision was given in *Macdonald v. The Law Union Fire and Life Insurance Company*(2). With regard to omissions, Malins, V. C., laid it down, in *The British Equitable Insurance Company v. The Great Western Railway Company*(3), that it is the duty of the proposer to communicate all facts to the company that will enable them to ascertain for themselves all about the proposer. That principle was affirmed on appeal(3). In *The British Equitable Insurance Company v. The Great Western Railway Company*(3) a falsehood was told by implication, the proposer having been refused by eight other officers, and accepted by one, and merely stating that he had been accepted by one. *Wainwright v. Bland*(4) shows that even statements orally made in the course of obtaining a policy must be strictly accurate. In *Traill v. Baring*(5), concealment was successfully set up as between two insurance companies, one of which, when re-insuring part of a risk with the other, undertook to retain the balance, but did not do so. [They also referred to *New York Life Insurance Company v. Phoebe Stella Gamble*(6); *Hall v. British Natural Premium Life Association, Limited*(7); *Fowkes v. The Manchester and London Life Assurance and Loan Association*(8); *Gopeekrist Gosain v. Gungapersaud Gosain*(9); and dealt with the evidence. They asked for an issue as to whether the policy had been obtained by misrepresentation by suppression of the fact of the death of the two sisters and the diseases of which they had died; and referred to section 53 of the Code of Civil Procedure, and *Damodar Madhooji v. Purmanandas Jeeuandas*(10) and *Narayan Ganesh v. Har Ganesh*(11). An issue on the point had been asked for towards the close of the trial. They contended that exhibit E, the confidential report by the doctor, had been

(1) 3 L.J., Ex., 141, 2 C & M, 348

(3) 38 L.J., Ch., 132, on appeal, *ibid*, page 314

(5) 4 De G.J. & S., 318

(7) 'The Times,' dated 26th January 1901

(8) 32 L.J., Q.B., 153; 3 B & S, 917.

(10) I.L.R., 7 Bom., 155.

(2) 43 L.J., Q.B., 131.

(4) 1 M. & W., 32.

(6) I L R., 27 Cal., 593.

(9) 6 M.I.A., 53.

(11) I.L.R., 18 Bom., 664.

improperly admitted. the doctor himself being alive and not called as a witness.]

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The Advocate-General (Hon'ble Mr. J. E. P. Wallis), for respondent.—The new issue asked for ought not to be permitted to be raised; *Moung Hmoon Htan v. Mah Hpwah*(1) The company are setting up a case inconsistent with the report of their medical referee, and should be held to be affected with the knowledge that was evidently possessed by that referee, who was their agent, *Bawden v. London, Edinburgh, and Glasgow Assurance Company*(2) and section 11 of the Evidence Act *Connecticut Mutual Life Insurance Co of Hartford v Moore*(3) shows that a company is only entitled to reasonable answers, and is not entitled to say that a physician was the proposer's last medical attendant merely because his advice had been taken for some trifling ailment. [He referred to *Wagstaffe v. Sharpe*(4), *Cazenove v. The British Equitable Assurance Company*(5) and to the evidence.] *Thomson v Weems*(6) shows that the company can only avoid the policy by showing that the age was wrongly stated and not otherwise. The onus is on the company to plead and show the breach of warranty, as they did in the case of *The Oriental Government Security Life Assurance Company, Limited, v. Sarat Chandra Chatterji*(7). Here it is not pleaded. Regarding the age of the assured, the documents most in his favour show that the discrepancy, if there is one, is only from two to three years On the construction of documents, *New York Life Insurance Company v. Phoebe Stella Gamble*(8) shows that any ambiguity must be construed against the company. [He dealt with the evidence and contended that it had not been shown that plaintiff's age had been mis-stated.]

Mr J. H. M. Ryan, in reply —Though sections 101 to 105 of the Evidence Act show that the burden of proof lies on those who wish to take advantage of the warranty; there are exceptions, and in this case the prospectus shows that proof of age must be given before plaintiff can recover The burden of proving this is thrown on the plaintiff by a special term of the contract.

(1) L.R., 11 I.A., 109 at p 120; 1 L.R., 10 Calc., 777.

(2) [1892] 2 Q.B., 584.

(3) L.R., 6 App. Cas., 644

(4) 7 L.J., Ex., 167.

(5) 29 L.J., C.P., 160.

(6) L.R., 9 App. Cas., 671 at p. 677.

(7) I.L.R., 20 Bom., 99

(8) I.L.R., 27 Calc., 593.

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Under the latter, plaintiff would fail if no evidence of age were given by either side

The Court delivered the following judgments:—

Sir ARNOLD WHITE, C.J.—This is an appeal from a judgment for the plaintiff in an action on a policy of life insurance. The defendants raised various defences in the Court of First Instance. Before this Court the defence relied upon was that the policy had been obtained by means of misrepresentation as to the age, health, means or circumstances of the assured.

The policy is for a sum of Rs 6,000, and is dated 28th September 1898. The assured died on 27th September 1899. The policy recited that the assured had signed a statement in writing declaring that his age on his next birth-day would not exceed fifty-eight years and setting forth the past and present state of his health and other circumstances touching his habits and life and that the assured had agreed that this declaration and relative personal statement made to the medical referee of the defendants should be the basis of the contract between the assured and the defendants. The policy contained a condition that in case any statement or allegation contained in the declaration were untrue, or if the assurance had been made through any misrepresentation, concealment or untrue averment whatsoever, the policy should be void, and provided that the assurance should be subject to the regulations and conditions comprised in the defendants' prospectus. With reference to age the prospectus contained the following regulation or condition:—"The Directors do not withhold the issue of a policy until age has been proved, but recommend assurers to provide evidence of age as soon as possible, as it is required on settlement of claims if not previously produced."

In his proposal for assurance, dated 6th August 1898, the assured stated the date of his birth to be 25th of Adi, Sarvari, (7th August 1840), and his age next birth-day to be fifty-eight.

In his personal statement the assured stated his age next birth-day to be fifty-eight and in the declaration annexed to his personal statement, dated 6th August, though apparently not signed till 8th August, the assured solemnly declared that according to the best of his knowledge and belief he was then in good health and had had the small-pox and had not had certain specified diseases, and that his age did not exceed fifty-eight years, and that he had fully and faithfully answered all such questions as had been put to him

in the form of proposal and by the medical referee relative to his habits, constitution and general state of health without concealment or reservation of any kind. It is a question whether this declaration so far as it relates to the age of the assured amounts to a warranty that all the statements made and referred to therein are true to the best of the knowledge and belief of the assured, or whether the words with reference to knowledge and belief only govern the earlier portion of the declaration, and the declaration in so far as it relates to the age of the assured would be construed as a warranty that the age of the assured did not in fact exceed fifty-eight years. Upon the principle which has been often laid down in cases of this class, (see, for instance, the judgment of Lord Watson in *Thomson v. Weems*(1)) if the words are ambiguous they must be construed *contra proferentes* and in favour of the assured, I think the declaration should be construed as amounting to a warranty that the age of the assured was fifty-eight to the best of his knowledge and belief.

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With regard to this question of age it was contended on behalf of the defendants that the onus was on the plaintiff to show that his age was in fact fifty-eight, or, adopting the construction of the warranty which I am prepared to adopt, that it was fifty-eight to the best of his knowledge and belief. On behalf of the plaintiff it was contended that the onus was on the defendants to show that the age of the assured was not fifty-eight, or not fifty-eight to the best of his knowledge and belief. Apart from the special condition contained in the prospectus I should have felt no doubt that the burden of proof was on the defendants. Apart from this condition the present case, so far as this question is concerned, seems indistinguishable from the case of *Thomson v. Weems*(1), (see the judgment of Lord Blackburn on page 684). The condition in the prospectus is to the effect that the directors require evidence of age on settlement of claim if such evidence has not been previously produced. In *The Oriental Government Security Life Assurance Company, Limited, v. Sarat Chandra Chatterji*(2)—a suit brought in 1895 on a life policy issued by the present defendants—the policy was in the same terms as that now in use by the defendants, and their policy contained a condition with reference to evidence of age substantially the same as that contained in the present

(1) L.R., 9 App. Cas., 671 at pp 684, 687. (2) I.L.R., 20 Bom. 98.

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prospectus The prospectus in use in 1895, however, contained a provision which does not appear in the present prospectus—"policies held by parties on their own lives are indisputable on any ground whatever except fraud." This was clearly a provision in favour of the assured. In the Bombay case it was held that the condition in the prospectus had the effect of imposing on the assured the obligation of giving proof of age before the company could be called upon to pay. With reference to the further terms in the prospectus—"policies held by parties on their own lives are indisputable on any ground whatever except fraud"—it was held that this did not relieve those claiming on the policy from the burden of giving proof of age, and that its effect was merely to relieve the assured from the legal effect which an innocent misrepresentation as to age would otherwise have under the strict terms of the contract. If the view of the Bombay High Court that the burden lay on the plaintiff is right, it seems to me this would be so *a fortiori* in the present case, since the present prospectus does not contain the provision with reference to policies being indisputable on any ground excepting fraud. If it were necessary to decide the point in the present case, one might have to consider the legal effect of a general reference being made to the prospectus in the policy without evidence being forthcoming that the prospectus had been read by the assured or brought to his knowledge in any way except by a reference to it in the policy itself.

For the purposes of my judgment, however, I am prepared to assume that it was for the defendants to show that the statement made by the assured with reference to his age was not true to the best of his knowledge and belief.

In his proposal for assurance the assured stated the precise date of his birth, giving the name (Sarvari) of the year during the Hindu cycle of sixty years. The corresponding English date is August 7th, 1810. The proposal is signed on August 6th, the day before, according to his statement, the anniversary of his birthday. According to this statement the age of the assured at the time of his death would have been fifty-nine years and some seven weeks.

No doubt the oral testimony adduced on behalf of the defendants with reference to the question of the age of the assured is vague and inconclusive.

One A. Venkata Chari (defendants' sixth witness) a *sapinda* of the assured, stated at the trial that he (the witness) was seventy-one and that the assured was five or six years younger and would have been sixty-four or sixty-five at the time of his death

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One Venkatarama Nayadu, a Village Munsif (defendants' seventh witness) who said he had known the assured since childhood, stated that he was over sixty when he died. A relation, one M. Ranga Chari, the Village Munsif of Mamandur,—the village in which the assured lived—(defendants' seventeenth witness) who gave his own age as eighty-one, gave evidence to the same effect

Sundara Chariar (defendants' nineteenth witness) another relative, stated he had known the assured since childhood, and that he (the witness) was his junior by a year. This witness, who gave his own age as sixty-five, said that the assured was treated by the villagers on ceremonial occasions as the elder man of the two. One Kuppiah Pillai (defendants' tenth witness) said he was a Census enumerator in 1891 and stated that in that year, for the purpose of the Census, the assured told him he was fifty-four. Evidence of this sort would carry very little weight if it stood alone. It does not, however, stand alone but is supported by documentary evidence. I will deal first with certain documents which were tendered in evidence by the defendants and were not admitted by the learned Judge. A document relied upon by the defendants was the so-called original of the document exhibit G which was put in evidence by the plaintiff. Exhibit G purports to be a true extract signed by the karnam of Mamandur from the death and birth register of the village. In the entry relating to the assured under the heading "remarks" appear the words "about sixty years old." Exhibit G was put in evidence in the cross-examination of one of the defendants' witnesses—Kuppiah Pillai, the village conicopillai of Mamandur. This witness had stated in chief that he had been a Census enumerator in 1891 and that the assured had given his age then as fifty-four. In cross-examination he stated it was his duty to make a return of deaths—the document, exhibit G, was put to the witness and he admitted that it had been signed by him. In re-examination a document which was described as the original from which exhibit G was an extract was put to the witness who admitted it was also signed by him. The suggestion on behalf of the defence was that in the so-called

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original it would appear that the words "above sixty years of age" had been written in the first instance and that an alteration had been subsequently made. The objection was taken on behalf of the plaintiff that this document was inadmissible and the learned Judge excluded it. I think the document ought to have been admitted in evidence. It seems to me, however, that the evidence as to the circumstances in which the so-called original and the so-called extract were written are not sufficiently clear to justify us in attaching any weight to either of these documents as supporting the case of one side or the other. The defendants also sought to put in evidence a book kept at the hospital at Arkonam containing certain entries said to have been made in the year 1894. The book was produced by a hospital assistant who stated that the entries were made by one Kumarasami Mudaliar and that this man was alive. The learned Judge held that these entries had not been proved and declined to admit them in evidence. I think he was right.

I now come to the documentary evidence relied upon by the defendants as to which no question of admissibility has been raised. Exhibit XXI is a deposition made by the assured before a Magistrate on May 5th, 1894. In the heading to the deposition he is described as fifty-seven years of age. Assuming—in favour of the assured—this to mean he was in his fifty-seventh year or that his age next birthday would be fifty-seven, this would make him fifty-seven on August 7th, 1894 (the anniversary of his birthday according to the statement in the proposal) and sixty-one and not fifty-eight on August 7th, 1898. Exhibit II is a deposition by the assured in a suit before the District Munsif of Sholinghur, dated October 22nd, 1894. In the heading the age is given as fifty-eight. Assuming this means in his fifty-eighth year, this would make him fifty-eight on the 7th August 1895 and sixty-one on August 7th, 1898.

Exhibit III is another deposition before the same Munsif in another suit dated 7th February 1896. The age is given as sixty. Assuming this means in his sixtieth year this would make him sixty on August 7th, 1896, and sixty-two on August 7th, 1898. Exhibit IV is a deposition before a Magistrate dated 18th December 1895. His age is given as sixty. Assuming again this means in his sixtieth year, this would make him sixty on August 7th, 1896, and sixty-two on August 7th, 1898. Thus, according to

two of the depositions he would have been sixty-one and according to two of them he would have been sixty-two on August 7th, 1898. It is true that the statements as to age form no part of the sworn statement of the witness. The statements form part of the heading to the deposition which contains the description of the witness. The description consists of his father's name, his caste, his calling, his age and his residence. This is necessarily made out from information supplied by the witness. The learned Judge in the Court of First Instance did not attach much importance to these statements. He observed "We all know very well that when a witness comes into the witness box it really does not matter what his age was. The age is given in a most perfunctory manner for no purpose whatever except for the purpose of identity" This may be quite true, but the statement as to age is no more perfunctory than the statement as to residence or calling, but the presumption is that the statement is true to the best of the witness's knowledge and belief. The statement is made at a time when the witness had nothing to gain by making a false statement. The evidence afforded by the statements connected with these depositions is to my mind sufficient to shift the onus which I have assumed rests upon the defendants and make it incumbent on the plaintiff to displace this evidence. I now turn to the evidence in support of the plaintiff's case with reference to the question of age. I take the oral evidence first Srinivasa Chari (the plaintiff's second witness) the son-in-law of the assured said nothing about the age in his examination-in-chief, but in cross-examination he said that he knew the age of his father-in-law from what his father-in-law had told him. "When he was confined to his bed he said that he was sixty and that his relatives never lived beyond sixty. He died three days afterwards." There is a curious inconsistency between this statement, if it was ever made, and the particulars given in the personal statement of the assured with regard to the age at death of his near relations. According to the personal statement his father died at the age of eighty-two and his mother at the age of seventy-six and his brother at the age of seventy. He also stated in his personal statement that his sister, who was alive in 1897, was aged 88. The plaintiff also spoke to a ceremony which takes place on the completion of the sixtieth year, and he said that this ceremony had not been performed in the case of the assured. He said in cross-examination that

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this ceremony was optional and in re-examination that it was more often performed than not. The plaintiff's third witness (a Brahman purohit) when asked as to age said it might be fifty-six, fifty-seven or fifty-eight. In cross-examination he said he had never been told and his statement as to age was a guess. This is all the oral testimony and it is quite as unsatisfactory and inconclusive as that of the defendants' witnesses.

The documentary evidence on which the plaintiff relies consists of a series of written statements forwarded by the plaintiff to the defendants after the death of the assured. These statements were with one exception, made out on printed forms which were supplied by the defendants at the request of the plaintiff. According to the plaintiff's evidence they were filled up by a man of the name of Viraraghava Chari in the presence of the plaintiff. Viraraghava Chari was the son-in-law of one Desika Chari, Desika Chari, at the time the assurance was effected, being a sub-agent of the company. The first of the documents (exhibit VII (a)) purports to be a certificate of death. The form requires the age at the time of death to be stated and the age is given as 57. The certificate is signed by one Banguri Maistri, who describes himself in the certificate as a medical practitioner at Mamandur. This man was called as a witness for the defence (defendants' ninth witness). At the trial he described himself as a dhobie. He says he signed the certificate at the request of the Ayyar who wrote it. He said he signed the certificate on the pial of a house and then went before a Magistrate. The next document exhibit VII (b) is a certificate of burial or cremation. The form requires the age to be stated and the age is given as fifty-nine years two months. This certificate purports to be signed by P. Venkatarama Nayadu, Village Munsif of Venkatapuram. This man was called as a witness for the defence (defendants' eighth witness). He says he signed the certificate because the plaintiff said he was the heir but that he did not know what its contents were. The next document (exhibit VII(c)) is a certificate of identity. The age is stated as about fifty-nine. It is signed by one O. Srinivasa Chari, a landholder of Mamandur village. He was called as a witness for the plaintiff but merely said that he made a statement after the assured died. The next document (exhibit VII(d)) is a certificate by employer. The age is stated as fifty-nine. It is signed by Kumarasami Reddiar, Village Munsif of Arungulam.

village. He was called by defence (defendants' twenty-third witness). He says he signed the certificate at the request of the plaintiff and Srinivasa Chari and the certificate was not read out. Of course these documents are valueless as evidence of age. The persons who signed them had no special knowledge as to the age of the deceased and the evidence shows that they signed the forms after they had been filled up and in ignorance of their contents. The documents, at the highest, even if the persons had certified to the statements as of their own knowledge could only have been corroborative of any oral testimony the persons who signed them might have given at the trial. The last document of the series (exhibit VII (c)), however, stands upon a different footing. It purports to be a declaration with regard to the age of the deceased made by his sister who was alive at the time but who died before the trial. It is not made on a printed form, as is the case with certificates above referred to, but follows a form of declaration by a relative or friend which is given in defendants' prospectus. It is as follows:—

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Declaration of age of Chelrama Venkatachariar under Policy No. 38273.

"I, Ammalammal, do solemnly and sincerely declare that M. Chelrama Venkatachariar was born on or about the end of the month of Adi, Tamil year Saiwai, which corresponds to the month of August 1840. I remember the date of his birth, since he was a child three days old when my mother's younger sister died of fever, having been bed-ridden for about three months, and I make this solemn declaration conscientiously believing the same to be true."

Now this statement would appear to be admissible in evidence under section 32 (5) of the Evidence Act as a declaration made by a deceased person, provided of course that the evidence establishes that the declaration was in fact made. In my opinion the evidence in the present case does not establish this. It appears from the declaration itself that the sister was a markswoman. The statement was drawn up in English. The woman was ignorant of English and there is no evidence that the statement was interpreted to her. The certificate of the Magistrate, whatever it may be worth simply says "declared." The evidence shows the same procedure was adopted with reference to this statement as with regard to the certificates. They were first drawn up, then the necessary signatures were obtained, then they were "declared" before a Magistrate. The plaintiff said that exhibit VII (c) was marked in his presence

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before a Magistrate. He also said that the deceased woman volunteered the statement herself. It is perfectly clear that she cannot have "volunteered" the whole statement since it refers to the English month of August 1840. In my judgment the plaintiff's evidence merely shows that the deceased sister put her mark to a statement which was "declared" before a Magistrate. It does not establish that the declaration upon which the plaintiff relies was, in anything more than form, a declaration made by the deceased woman.

There is thus no evidence to displace the evidence of the defendants except the oral testimony of the two witnesses called on behalf of the plaintiff to which I have referred. In my judgment, therefore, assuming the onus to be on the defendants, the defendants have discharged that onus. The inference which I draw from the evidence of the statements made in connection with the depositions is that the assured's statement with reference to his age was in fact an untrue statement and that it was untrue to the knowledge and belief of the assured.

With regard to the other alleged mis-statements upon which the defendants have relied in connection with the answers given by the assured in his personal statement, viz., the answers to questions 5 (a), 10 (b), 10 (c), 12 (a), 12 (b) and 14, it is enough for me to say that, in my opinion, upon the evidence, these alleged mis-statements are not of such a character as would entitle the defendants to say that the policy is avoided thereby. In the view which I take with regard to the misrepresentation as to age it is not necessary for me to discuss the various authorities which were cited in connection with the alleged misrepresentation as to health and medical attendance and the alleged *suppressio veri* conveyed in answer to the questions—"How many brothers and sisters are now living?" "If any died at what ages did they die?" With regard to the question of the sisters I think the Judge was right in declining to frame an additional issue as to whether the policy was obtained by means of misrepresentation, by suppression of the fact of the deaths of two sisters, their ages and the diseases they died of.

In the case before us the assured made a statement which was untrue in fact and which was, as I am prepared to hold on the evidence, untrue to his knowledge and belief. The statement was in the nature of a warranty and formed part of the basis of the contract. For this reason I think the suit ought to have been dismissed and I think this appeal ought to be allowed with costs.

The respondent must pay the costs of the appellants in the Court of First Instance.

BHASHYAM AYYANGAR, J.—I am also of the same opinion. Before considering the questions of law and of fact raised in this appeal, it is of great importance to construe the contract of insurance on which the suit is based, by carefully comparing the several stipulations which are relevant to the present case with each other and with certain statements made in certain documents which are referred to in and incorporated with the policy.

The first paragraph of the policy sets forth that the assured has agreed that exhibit I (a), dated the 6th August 1898,—the latter portion of which is the declaration made by the assured before the medical referee of the defendant company after having been examined by him, and the former portion the statement delivered by the assured to the medical referee—shall be the basis of the contract between the assured and the company.

In paragraph 3, the operative part of the policy, it is expressly stipulated “that in case any statement or allegation contained in the declaration hereinbefore mentioned be untrue or if the assurance hereby made shall have been made through any misrepresentation, concealment or untrue averment whatsoever . . . this policy shall be void and all moneys paid in respect thereof shall be forfeited to the company.” It is also stipulated that “the assurance hereby made shall at all times and under all circumstances be subject to the regulations and conditions comprised in the company’s prospectus, dated 1st July 1896” (exhibit XVII).

It will thus be seen that while the recital is that the whole of exhibit I (a) is made the basis of the contract, the operative part declares that if any statement or allegation contained in the latter part of exhibit I (a), *i.e.*, the declaration before the medical referee, be untrue or if the assurance had been obtained through any misrepresentation, concealment or untrue averment whatsoever, the policy shall be void. And the regulations and conditions comprised in the company’s prospectus are also made the basis of the contract in that the policy of assurance is subject to such regulations and conditions.

In my opinion the assured has given a warranty, which, in cases of insurance, operates as a condition precedent to the attaching of any risk under the policy, that every statement and allegation contained in the declaration (the latter part of exhibit I (a)) is substantially and in fact true; and according to authorities now well established,

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the question for the consideration of the Court is, not the materiality or otherwise of such statement or allegation, but its truth.

The additional stipulation that if the assurance had been obtained through any concealment or through any misrepresentation or untrue averment whatsoever, the policy shall be void, must be taken to refer to the personal statement (the former portion of exhibit I (a)), to the additional answers, if any, made to the medical referee, and to the answers to the questions in the proposal, exhibit I, also dated the 6th August, at the foot of which the proposer certified that his answers were correct. In my opinion, this additional stipulation cannot operate as a warranty and unless the misrepresentation, concealment or untrue averment to which it refers be material, in the sense that it is likely to have influenced the insurers in determining whether to accept the risk at all and, if so, at what premium, the authorities are equally clear that it will not affect the validity of the contract and discharge the company from performing its part of the contract.

The only portion of the company's prospectus (exhibit XVII) which is relevant to the present case is that relating to the proof of age, which provides that the company does not "withhold the issue of the policy until age has been proved but recommends assured to produce evidence of age as soon as possible as it is required on settlement of claim if not previously produced"

For the purpose of ascertaining the extent of the warranty given by the assured, reference has to be made to the declaration contained in exhibit I (a). It is clear that in regard to the health of the assured the warranty is only that "to the best of the assured's knowledge and belief, he was at the time in good health, had had the small-pox, did not labour under insanity, etc." The warranty then extends to the age of the assured and his residence in India. It is contended on behalf of the respondent that this warranty is not an absolute warranty, but as in the case of the assured's health, only a warranty that 'to the best of the knowledge and belief of the assured his age did not exceed fifty-eight years and that he passed fifty-eight years or thereabout in India.' The assured then gives a warranty that he has fully and faithfully answered, without concealment or reservation of any kind, all such questions as have been put to him in exhibit I—the proposal form—and also such as have been put by the medical referee in the personal statement (first part of exhibit I (a)) relative to 'his habits, constitution and general state of health.' It should be

noted here that the warranty last referred to does not extend to all questions in the proposal form and in the personal statement, but only to such as relate to the habits, constitution and general state of health of the assured.

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I am unable to accede to the contention that the warranty as to age is not an absolute warranty. It is undoubted that in construing contracts of insurance which are prepared by the insurers the language must be taken more strongly against them and that, if by reason of any ambiguity in it it is susceptible of two meanings, that which is more favourable to the assured should be adopted. But there should be a real and not apparent ambiguity. In deciding whether the language of the policy is ambiguous or not, we should not be influenced by considerations of the position in life of the individual assured, his literary capacity or his mother-tongue. The warranty as to age is no doubt contained in an involved sentence and on superficial reading one may receive the impression that the phrase 'according to the best of my knowledge and belief' occurring in the first clause also qualifies the second clause relating to age. But a careful and close perusal of the whole sentence clearly shows that the above phrase does not qualify the second clause, it having advisedly been inserted after and not before the word 'that' occurring in the first clause. The introduction of the word 'faithfully' in the third clause would be quite unnecessary if the said phrase governed the second clause and consequently the third also. But it has been advisedly inserted in the third clause as it was not qualified by the said phrase. There being therefore no real ambiguity the policy must be construed as a warranty of the assured's age in truth and fact and not simply as a warranty of his belief as to his age. Considering the importance of the age of the assured in a contract of life insurance it is only reasonable that the warranty as to age should be absolute—at any rate in the sense that it does not exceed a certain figure, and not simply as to the belief of the assured, a belief which in the majority of cases the company cannot be in a position to disprove, though in reality such belief may not be *bonâ fide* or may even be dishonest.

If the warranty was only as to the belief of the assured as to his age, the onus will no doubt be upon the company to prove a breach of warranty by establishing that the assured could not have believed that his age did not exceed fifty-eight years. And even if the warranty be an absolute one, as I hold it to be in this case, the

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onus will probably be on the company, as in other cases of breach of warranty as to the assured's habits, health, medical attendance, etc. (*per* Lord Blackburn, J., in *Thomson v. Weems*(1)), to disprove the correctness of the age as given by the assured. But as held by Farran, J., in *The Oriental Government Security Life Assurance Company, Limited v. Sarat Chandra Chatterji*(2), the effect of incorporating into the policy the prospectus of the company (exhibit XVII) is, I think, to throw upon the assured or his representatives the onus of proving the correctness of the age as warranted by the assured. By reason of such incorporation the policy has to be construed as containing a stipulation that the policy is issued subject to the assured proving the correctness of his age as early as he may find it convenient during his life time, or in default thereof his legal representative proving the same on the settlement of his claim under the policy. If the assured, subsequent to the issue of the policy, produces before the company any proof of his age and the company, being satisfied with the proof, admits in writing the correctness of the age, the legal representative of the assured need not prove the same in an action upon the policy against the company. Under section 58 of the Indian Evidence Act such an admission will dispense with proof of the fact admitted. With all deference to Farran, J., I am unable to concur in the view taken by him in the above case that the effect of such admission will only be "that the onus of disputing (disproving) the age will be thrown on the company" (page 102). Nor am I able to agree in the view taken by that learned Judge that, notwithstanding the saving clause (contained in the prospectus which was incorporated in the policy on which the said case was based) to the effect that policies held by parties on their own life are indisputable on any ground whatsoever except fraud—a clause which has been deleted from a later prospectus of the same company, which is the one incorporated into the policy on which the present suit is brought—a person claiming under such policy is not relieved from the burden of giving proof of the age of the assured, but that the legal effect of such saving clause would only be to relieve the assured from the consequences of an innocent misrepresentation as to his age which would otherwise ensue under the strict terms of the contract. If age had been admitted in writing by the company after being satisfied with the

(1) L.R., 9 App. Cas., 671 at p. 684.

(2) I.L.R., 20 Bom., 99 at p. 102.

proof furnished by the assured, not only would the person claiming under the policy be relieved from the necessity of proving the age in an action brought on the policy, but the company also would be precluded from producing, as of right, evidence to disprove the age as admitted. If, however, the Court is satisfied that the admission has been obtained by fraud or that there is other good and sufficient cause, it will be in its discretion, under the proviso to section 58 of the Evidence Act, to require the fact to be proved otherwise than by such admission. As regards the saving clause in the prospectus, it will have the same effect as though it were a proviso contained in the policy itself and preclude the company from disputing its liability under the policy on any ground whatsoever except fraud, the onus of establishing which will of course be on the company and I do not see how, in the face of such proviso, it can call upon the person suing upon the policy to prove in the first instance that the age was correctly stated or at least that it was innocently and honestly mis-stated or misrepresented by the assured. This question however does not arise in the present case, inasmuch as the said clause does not find a place in the prospectus with reference to which the policy in question has been issued

As regards the effect to be given to the prospectus as a part of the contract of insurance, I think it will have the same effect as if it had been reproduced in the policy itself and it is quite unnecessary to prove that the prospectus had been read by the assured or that it was specially brought to his notice by the company apart from the reference made to it in the policy itself. A policy of insurance being a contract entered into between the insurers and the assured, and the terms of such contract resting entirely upon the contract itself and not in the main or even in part upon the common law or upon the Statute, the assured, who makes the proposal, enters into the contract and signs the policy, has in the very nature of things notice that the policy contains all the terms and conditions of the contract. In the leading case on the subject, *Watkins v Rymal*(1), the test laid down by Stephen, J., in delivering the judgment of the Court is "can it be said that the nature of the transaction was such that the plaintiff might suppose, not unreasonably, that the documents (handed to him) contained no terms at all, but was a mere acknowledgment of an agreement not intended to be varied by special terms?"

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(1) L.R., 10 Q.B.D., 178 at pp. 188, 189, 190.

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Applying this principle to the case before him—which was the acceptance of a carriage for sale on commission—it was held that the terms of such a contract not being established by the common law in the absence of any special agreement of the parties, they must from the nature of the case, be as special as those of a contract of lease or a bill of lading and that such consideration alone was sufficient to establish the conclusion that the receipt and the conditions to which it referred constituted the contract between the parties and that “the learned common serjeant misdirected the jury when he told them that the question was whether the defendant had given reasonable notice to the plaintiff of the conditions.” The result of the authorities which were all reviewed in that case is stated as follows:—(at page 188) “A great number of contracts are in the present state of society made by the delivery, by one of the contracting parties to the other, of a document in a common form stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered, this person is as a general rule bound by its contents and his act amounts to an acceptance of the offer made to him whether he reads the document or otherwise informs himself of its contents or not.” To this general rule four exceptions are specified which it is unnecessary to refer to here as none of them are in any way applicable to the present case. The decision of the House of Lords in *Richardson, Spence & Co., and “Lord Gough” Steamship Company v Rowntree*(1) in which the question was as to the effect of a ticket containing various conditions received from a carrier by sea, by a passenger who did not read it, which ticket when issued was folded up so that no writing was visible unless the passenger opened it, in no way departed from the principles laid down in the leading case above referred to.

The onus of proving the correctness of the age given by the assured being, as above stated, on the plaintiff who claims under the policy, has he discharged it? In my opinion he has entirely failed, and a stipulation which has the effect of throwing the onus on the assured or his legal representative is perfectly reasonable in a country where it is only very recently that a system of registration of births under the sanction of law has been established.

(1) [1894] A.C., 217.

The oral evidence of the witnesses examined by the plaintiff as to the age of the assured is altogether valueless. Even assuming such evidence to be legally admissible, it is mostly opinion evidence, more or less conjectural. In a case in which the difference between the contending parties as to the age of a deceased person is not more than three or four years, such evidence, even if it be the evidence of an expert medical witness, can hardly carry sufficient weight to be relied upon in deciding the question. The evidence of the only witness on behalf of the plaintiff who speaks to a conversation which his father-in-law the deceased had with him shortly before his death, as to his own age and the ages of other deceased members of the family, is, so far as it goes, against the plaintiff. The statement of the deceased himself as to his age contained in the proposal form (exhibit I) and in the declaration exhibit I (a) is legally admissible in favour of the plaintiff under section 32, clause (5) and section 21, clauses (1) and (3) of the Evidence Act. But it can carry but little weight when it is opposed to prior statements made by the assured himself in respect of his age, in exhibits XXI, II, IV and III. Even according to his own statement in the proposal form the assured was bordering upon sixty and, if it be true, as was sought to be elicited from Mr Corlett (the joint secretary of the local agent of the company) who was examined as a witness on behalf of the defendant, that according to the practice of the company no life at all is accepted for insurance beyond the age of sixty, the assured would have had a strong motive to understate his age below sixty though he was really sixty-two or sixty-three years of age at the time of the proposal. In my opinion the learned Judge ought not to have disallowed such evidence on the ground that it would be inadmissible "unless it be shown that the assured was informed of it." Even if such evidence may not directly establish that the assured had knowledge of such practice, such knowledge may be reasonably inferred from the evidence which was excluded, coupled with other evidence in the case. It is clearly established that the assured was in communication with the sub-agent of the company in the matter of effecting the insurance and that he was assisted by the sub-agent's son-in-law who filled up the proposal form and who shortly thereafter became a sub-agent himself. If according to the practice of the company a life is not insured after the age of sixty, the agents and sub-agents of the company would know of such practice and it may reasonably be inferred that the assured

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would have learnt of the same from the sub-agent just as he learnt that, after the payments of premia for some time, he could raise a loan from the company itself on the security of the policy to enable him to continue the payment of premia. Whether such inference can be safely drawn or not will in no small degree depend upon the nature of the evidence which might have been given by Mr Corlett if the same had not been excluded. If such be not the practice of the company or if at any rate the assured had no knowledge that such was the practice of the company the only motive which the assured could have had in understating his age would be to insure his life at a lower premium than he would have had to pay if his age had been truly stated. But considering that even according to the defendant the assured did not understate his age by more than three or four years, I do not know if the difference in the premium would be considerable; and if the difference be small I should not be disposed to accept the theory that he understated his age by three or four years simply for securing the advantage of a slightly reduced rate of premium at the risk of forfeiting the policy but for his own prior statement as to his age made on four different occasions when he appeared as a witness in certain cases. He could possibly have had no motive in overstating his age on any one of those occasions and the statements made as to his age on those different occasions substantially tally. The fact that those statements as to age were made by him not on oath is perfectly immaterial in determining, for the purposes of the present suit, the weight to be attached thereto as against the later statement as to his age made in the proposal form (exhibit I).

The next document exhibited on behalf of the plaintiff which requires to be noticed is exhibit E, the confidential medical report sent to the company by Dr. Giffard after he examined the assured.

Assuming that there was no false personation and that the person examined by the medical referee was the assured himself, it is difficult to see on what principle his report to the company could be admitted in evidence without examining Dr. Giffard himself as a witness. If he were examined as a witness he could no doubt refresh his memory by referring to his report. The medical report is a record of certain facts observed by the referee and of the opinions formed by him, as an expert, as to the health, age, etc., of the assured. Such of those facts and opinions as may be relevant to the enquiry in the present suit cannot be proved by

the production of the report, but only by the evidence of Dr. Giffard (section 60 of the Evidence Act). It is impossible to accede to the contention that the statement made by the medical referee in his report to the company should be treated as statements made by the company's agent and therefore admissible against the company as admissions under sections 18 and 21 of the Evidence Act, and in my opinion, it will make no difference whether the medical referee is specially employed in individual cases or is the standing medical referee of the company. A medical man is selected and employed by the company to examine the applicants for insurance and report confidentially the conclusions to which he may come, as an expert, as to the various questions referred to him for observation and opinion as to the health of the applicants. The very nature of the employment and the purpose for which the medical referee is employed preclude the notion that the record of the observations made and of the opinions formed by him ought to be treated as admissions made by the insurance company. One of the questions referred to Dr. Giffard is "Does he (the applicant) look older or younger than the avowed age (58 years)?" This question is answered "no." Is this to be treated as an admission by the company that the age given by the assured was correct? It is simply the opinion of an expert on the question and if the plaintiff wants to rely upon it he can only do so by examining the doctor as a witness as to the opinion formed by him and the grounds on which that opinion was formed (section 60 of the Evidence Act). As stated already even expert opinion in the matter of age cannot be safely accepted and acted upon when the difference between the contending parties as to the age is only about three years.

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The next piece of evidence on behalf of the plaintiff, which is strongly relied upon and on which the judgment of the learned Judge is chiefly based is exhibit VII (e), dated 29th October 1899, purporting to be a declaration made by the sister of the assured that "he was born on or about the end of the month of Adi, Tamil year Sarvari, corresponding to August 1840." The evidence that it is a statement made by the sister since deceased is very meagre. It is in the English language and she affixes her mark to it in the presence of the Magistrate. A statement as to the age of a member of a family, made by his sister is no doubt admissible after her death under section 32, clause (5) of the Evidence Act, illustration (e) and *Ram Chandra Dutt v. Jogeswar Naram Deo*(1). The

(1) I.L.R., 20 Cal., 758.

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principle of the decision in my opinion is that the time of one's birth relates to the commencement of one's relationship by blood and a statement, therefore, of one's age made by a deceased person having special means of knowledge relates to the existence of such relationship within the meaning of section 32, clause (5). Even assuming that the statement can be regarded as one made by the sister, it can hardly carry any weight though technically it may be admissible in evidence. It is true it was not made after the question in dispute was raised, but it was made at the instance of the plaintiff by his paternal aunt for the express purpose of furnishing the company with proof that the age as given by the assured was correct, thereby securing to her nephew, the plaintiff, the payment of the amount. There is also internal evidence in the statement casting great suspicion on the declaration. She states that she remembers the date of her brother's birth since he was a child three days old when her mother's younger sister died. Her mother's sister must have been married into a different family and it is strange that she fixes the almost exact time of her younger brother's birth by associating it with her aunt's death without at all disclosing how she remembers that her aunt died in the year Sarvari, at the end of the month of Adi. Another circumstance which casts grave suspicion is the non-production of the assured's horoscope. If, as the assured stated in the proposal form, he knew the exact date of his birth, it is improbable that he would have had no horoscope.

The so-called solemn declarations made by certain other persons also, at the same time as the sister's, as to the age of the assured and which also have been marked as exhibits in the case are of no value whatever and are clearly inadmissible in evidence as the declarants are alive and some of them in fact have been examined as witnesses in the case. They can only be used in cross-examination (under section 145 of the Evidence Act) for the purpose of contradicting the witness, but they cannot be used to corroborate the testimony of the witness as the statements were not made before any authority legally competent to investigate the fact declared (see section 156 of the Evidence Act).

Turning now to the evidence adduced on behalf of the defendants as to the age of the assured, I have already adverted to exhibits XXI, II, IV and III. There is no reason whatever to distrust the statements therein made by the assured as to his age and according to those statements he understated his age to the company by about 3 years. The oral evidence adduced on behalf of

the defendants, except that of one witness, is not entitled to any weight. But I attach some weight to the evidence of Sundarachari. He is the assured's first cousin and he swears that his age is 65 and that the assured was his senior in age by one year. He deposes that the deceased was treated and respected as his senior in age, and that on occasions of ceremonies the villagers "treated me as the younger." If the witness was 65 when he was examined as a witness in this case in November 1900, he must have been about 62 years of age in August 1898 and the assured therefore, according to the evidence of this witness, must have been about 63 at that time.

For the foregoing reasons I am clearly of opinion that the plaintiff has not proved that the age given by the assured was correct, but that on the contrary the defendant has established by reliable evidence that the assured understated his age by about 3 or 4 years. Even if the warranty as to age were not an absolute one, but only a warranty as to the assured's belief of his age, I agree that there has been a breach of even this qualified warranty.

I shall now briefly advert to two other contentions raised on behalf of the appellant. It was strenuously argued that the policy was rendered void by reason of the assured not having alluded in the personal statement to the fact of two of his sisters having predeceased him. No allusion whatever was made to this either in the original or in the supplemental written statement. During the trial of the suit the plaintiff as his first witness stated in his examination-in-chief that the assured had three sisters. Several days after the plaintiff gave his evidence and closed his case, the defendants' counsel, after he had examined 16 witnesses for the defence, applied to the learned Judge to raise an additional issue as to "whether the policy was obtained by means of misrepresentation by the suppression of the facts of the deaths of two sisters, their ages and the diseases they died of." The learned Judge declined to frame this additional issue. The learned counsel for the appellant urges that the additional issue applied for ought to have been framed and that he should now be allowed to raise the same as it only raises a pure question of law. The argument that the issue applied for is a pure question of law is, in my opinion, based upon a misapprehension. It essentially raises an issue of fact or at any rate a mixed issue of law and fact. The matter stands thus; the tenth question in the personal statement has reference to this. The first part (a) of the question is "have your brothers and sisters

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been healthy?" Answer "yes"; the second part (b) "How many are now living and at what ages?" Answer "one sister at 88 years of age"; the third part (c) "if any died, of what diseases and at what ages did they die?" Answer "Brother died at 77 years of age." The plaintiff at the very outset of his examination-in-chief stated that the assured had three sisters, two of whom, therefore, must have been dead at the date of the personal statement. It is contended that the non-disclosure of the death of these two sisters in the answer to the tenth question is a breach of the warranty contained in the third clause of the declaration exhibit I (a). I am clearly of opinion that the answers to this question, which does not relate to the assured's 'habits, constitution and general state of health', are not within the purview of the third clause. The learned counsel says that as the question concerns the health of the assured's sisters, their longevity and the diseases they died of, it relates to the constitution and general state of health of the assured himself. This is placing a strained and rather fanciful interpretation upon the expression, "the constitution and general state of health" of the assured. Even if the clause had been differently worded so as to admit of the above interpretation, I should not, having regard to the use of the word 'faithfully' in the clause and to the rather confused manner in which the three parts of question 10 are framed, be prepared to hold that there was a breach of warranty unless the assured intentionally concealed the existence and death of the two sisters. It is clear that neither in the first nor in the second clause of the declaration is there any warranty in respect of this and, in my opinion, if the issue applied for be framed, the finding thereon will depend upon the second portion of the proviso in the operative part of the policy, viz., that the policy shall be void if the assurance shall have been obtained through any misrepresentation, concealment or untrue averment whatsoever. Whether the answer to question 10 in so far as it relates to the two sisters is to be regarded as a misrepresentation, or a concealment or an untrue averment, is immaterial; for the contract of insurance would have been vitiated only if the misrepresentation, concealment or untrue averment was such as to have influenced the insurers in accepting the risk or at any rate in accepting it at the premium agreed upon. There is a marked difference between the first part of the proviso which operates as a warranty of the statements and allegations contained in the declaration and the second part of the proviso which relates to any misrepresentation,

concealment or untrue averment by means whereof the assurance has been obtained. Unless therefore the misrepresentation, concealment or untrue averment was in respect of a material particular, the policy will not be vitiated (*London Assurance v. Mansel*(1)). If neither of the two sisters, therefore, died very young or of any disease which may be regarded as hereditary, the concealment will be perfectly immaterial as it would not have affected either the acceptance of the risk or the rate of premium. The issue applied for, if framed, will necessarily involve an investigation into the ages of the two sisters at the time of their death and the diseases they died of. The learned Judge therefore rightly declined to frame the additional issue, especially as the application was made at a very late stage during the trial of the suit.

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The last contention was that the learned Judge excluded from evidence certain copies of medical prescriptions which would go to establish that Dr. Varadappa was the medical attendant of the assured and that the assured had suffered for some years from various diseases including dropsy. The original prescriptions not having been produced, though all possible steps were taken by the defendants for their production in Court, secondary evidence of the same was admissible. Dr. Varadappa Nayadu when examined as a witness for the defence stated that he did not remember the assured and that he did not know if he had ever attended upon him. Exhibits XI (d), XI (e) and XI (f), which extend from the 13th to the 18th February 1894, were originally admitted in evidence under the impression that they were originals; but they were subsequently rejected when it was found that they were only copies. They have not been proved as copies, nor has it been proved that the signature on the originals from which they were copied was the signature of Dr. Varadappa. Even if the defendants were now to be allowed to adduce such evidence, it will only go to show that for less than a week in 1894 the assured consulted Dr. Varadappa and obtained prescriptions from him. Exhibits XXXI (a), XXXI (b), XXXI (c), XXXI (d) place it beyond reasonable doubt that the Venkatachari referred to in the prescriptions XI (d) to XI (f) is the assured. Judging from the contents of these prescriptions, the ailment for which they were given does not seem to be a serious one. The fact that the assured thus consulted Dr. Varadappa would

(1) L.R., 11 Ch.D., 363.

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not make him his medical attendant within the meaning of the question put to the assured in the proposal form and in the personal statement

Our attention was also drawn to copies of several other prescriptions which stand in the name of one Venkatachari in 1894, 1896, 1897, 1898 and 1899, and particularly to a prescription dated 23rd November 1897, which it is alleged is a prescription for dropsy. There is nothing whatever to identify the Venkatachari mentioned in these prescriptions with the assured. On the contrary the omission in these prescriptions to associate the name of the plaintiff with that of the assured, as is done in the prescriptions XI (d) to XI (f), and to debit the plaintiff with the costs of these prescriptions is significant. I may also observe that prescriptions in themselves will not prove that the person for whom they were given suffered from diseases for which such prescriptions are usually given. If the fact to be proved is not simply that the assured had a medical attendant but that he was suffering from any disease, that will have to be proved by examining the medical attendant who gave the prescriptions, which he may of course use for the purpose of refreshing his memory.

The only breach of warranty therefore which has been established in the case is the statement of the assured as to his age, and the plaintiff's suit fails only on that ground.

I do not think he is entitled under section 65 of the Contract Act to a refund of the premia paid on the policy during the lifetime of the assured. Section 65 can apply only to cases in which the agreement is discovered to be void or the contract becomes void at law for any of the reasons specified in the Contract Act. Neither that section nor section 64 applies to cases in which there is a stipulation that, by reason of a breach of warranty by one of the parties to the contract, the other party shall be discharged from the performance of his part of the contract.

Sir ARNOLD WHITE, C.J.—I agree that the plaintiff is not entitled to a refund of the premia.

Messrs *Short & Roll*—Attorneys for appellants.

Messrs *Branson & Branson*—Attorneys for respondent.

PRIVY COUNCIL.

KARUPPANAN SERVAI AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

SRINIVASAN CHIETTI AND OTHERS (DEFENDANTS),
RESPONDENTSP C *
1901.
December
2, 3.

[On appeal from the High Court at Madras.]

Civil Procedure Code—Act XIV of 1882, s. 596—Appeal to Privy Council—Concurrent decisions on facts—Leave granted where no substantial question of law was involved.

Where, on an appeal to the Privy Council, there were two concurrent decisions of the Courts below on facts sufficient to dispose of the suit, but the High Court had granted leave to appeal stating that "there seems to be a point of law which however has not been argued here, and it is therefore hereby certified that, as regards the subject matter, and the nature of the questions involved, the case fulfils the requirements of section 596 of the Civil Procedure Code, the Judicial Committee held, it appearing that there was no substantial question of law involved, that there was no sufficient ground for the leave to appeal, which ought not to have been granted

APPEAL from a judgment and decree (22nd July 1892) of the High Court at Madras confirming a decree (2nd May 1889) of the Subordinate Judge of Madura which dismissed the appellants' suit with costs.

The suit was brought by the villagers of Kurichiyendal to assert their right to the water flowing into the village tank and to the surplus water flowing from that tank into certain channels passing through the lands of the village.

The plaintiffs claimed as being entitled to the kudivaram (or tenants' interest), in the village of Kurichiyendal and the defendants represented the kudivaram, and also the melvaram (the interest of the landlords) interests in the adjoining village of Ariakudi. The melvaram or landlords' share of the produce of the village of Kurichiyendal was appropriated to the maintenance of a temple at a village called Iluppakudi, and was payable to certain persons called hakdars or persons possessing a right. The melvaram of Ariakudi belonged partly to the hakdars of the Ariakudi temple and partly to some of the defendants; the kudivaram

* Present Lords MACNAGHTEN, LINDLEY, and SIR FORD NORTH.

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or tenants' share of the produce of Ariakudi village belonged to the cultivating tenants represented by the remaining defendants.

In 1883 the hakdars of the Ariakudi temple sued the hakdars of Iluppakudi temple for the removal of certain bunds which obstructed the same channels as were in dispute in the present suit, and prevented the flow of water through them into the Ariakudi tank, and obtained a decree for the removal of the obstructions so far as they interfered with the flow of water into the Ariakudi, which decree was affirmed by the High Court at Madras on 5th January 1888. (See *Perumal v. Ramasami*(1)).

In the plaint in the present suit the cause of action was stated to be the obtaining of the above decree and the taking steps to execute it, and the plaintiffs prayed for a declaration that the defendants had no right in the said channels nor to the flow of water through them, for an injunction and for other relief.

The material defences appear from the following issues which were settled (among others) for trial in the suit:—(2) Whether the plaintiffs can maintain the suit in the absence of the other cultivating tenants of Kurichiyendal village. (3) Whether the melvaramdars of Kurichiyendal should also be parties in this suit, and is the suit maintainable in their absence as co-plaintiffs. (6) Whether the claim advanced in the suit is *res judicata* by the former litigation. (7) Whether the plaintiffs own kudivaram miras in Kurichiyendal or not. (8) Whether the lands traversed by the water channels in dispute appertain to Kurichiyendal or to Ariakudi. (9) Whether the bund is an old bund of the Kurichiyendal tank as stated in the plaint, or a bund newly formed in 1883 as pleaded by the defendants. (10) Whether the channels in dispute are mere pits formed by the stagnation of water in the years 1877 and 1878 as alleged by the plaintiffs, or are they long-standing channels irrigating the tank of Ariakudi village. (11) Whether the plaintiffs are entitled to an injunction restraining the flow of water in the channels and to block them up by the bund of the tank as claimed by them. (12) What decree are the plaintiffs entitled to and as against whom.

The Subordinate Judge gave his judgment on 2nd May 1889. He decided issues Nos. 1 to 6 and issue No. 8 in the plaintiffs' favour. On the seventh issue that, though the melvaramdar of Kurichiyendal as by a document (exhibit F), dated January 1878,

(1) I.L.R., 11 Mad., 16.

recognized the plaintiffs as kudivaram tenants, they were in fact merely occupancy tenants. He further considered that the fact that the plaintiffs, who admitted that they only held five-sixths of the kudi, had not made the proprietors of the remaining sixth share parties to the suit was an irremediable defect. On these grounds alone he was of opinion that the suit should fail though he proceeded to decide the other questions. On issues Nos. 9 and 10 he decided, on the evidence, both issues in favour of the defendants. On eleventh and twelfth issues which were merely the conclusions of law to be derived from what had already been decided on the facts the Subordinate Judge said:—

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“*Eleventh issue.*—Matters then stand thus :—The rain waters falling on the surface of Kurichiyendal lands used to collect and form themselves into the channels C and D, and those channels had been flowing into the Ariakudi tank for over twenty years. Then it follows that the defendants have acquired an easement in respect of the water flowing in those channels. The law on this point has been clearly and elaborately laid down by the High Court in the former suit between the melvaramdars of Ariakudi and the hakdars of Iluppakudi. (See *Perumal v. Ramasami*(1).) The result is that as directed in the decree of their Lordships in the former suit the defendants have the right to all the water flowing in channels C and D and the plaintiffs have no right, like the melvaramdar, to obstruct its flow. An injunction cannot, therefore, be granted in their favour as prayed for by them, either to restrain the flow of water in channels C and D or to block them up by the bund of their tank. It is a matter of great satisfaction to me that I should be able to come to the same conclusion on the merits as was arrived at by the other Subordinate Court in the former suit and as was adopted by the High Court. It seems to me that there being a *bonâ fide* decree obtained by the people of Ariakudi after full investigation, which was no doubt watched by these plaintiffs, more than the ordinary onus lies upon these plaintiffs to show that it was erroneous, and I am satisfied that they have failed to do so. I am equally satisfied that this suit is only a second attempt by the hakdars of Iluppakudi to enrich themselves at the expense of the defendants.

“*Twelfth issue*—I must, therefore, dismiss the suit with costs.”

From this decision the plaintiffs appealed to the High Court.

The material portion of the judgment of the High Court (MUTRUSAMI AYYAR and BEST, JJ), dated 22nd July 1892, was as follows:—

(1) I.L.R., 11 Mad., 16.

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"The Subordinate Judge decided the issues Nos. 1 to 6 and issue No. 8 in favour of the plaintiffs, and though objections were taken by the respondents to the findings on some of these issues, they were not pressed at the hearing.

"The contention on behalf of appellants is that the findings of the lower Court on the seventh, ninth and tenth issues are opposed to the evidence in the case.

"As regards the seventh issue which relates to the kudivaram right claimed by appellants in the Kurichiyendal village, the Subordinate Judge's finding is that if they have such right at all, it is under exhibit F of 1878 and not from time immemorial as claimed by them. On referring to the evidence, we see no reason to differ from him. We consider, however, that exhibit F confers upon appellants this right and that is sufficient to enable them to maintain this suit.

"The Subordinate Judge notices that exhibit F shows that appellants represent only five out of six shares in the kudivaram right and that the owner of the sixth share is not a party to the suit, and he appears to consider this fatal to the suit. We do not understand why the owner of the sixth share was not included by the Court as a party if the order under section 30 of the Code of Civil Procedure is not sufficient to make the decree that may be passed in the suit binding upon him also.

"We do not think it necessary to remit the case for re-trial on this ground, as we agree with the Subordinate Judge in his findings on the ninth and tenth issues.

"The questions raised by these issues are (1) whether the bund marked G2. S.T.O. in the plan A was newly raised by appellants in 1883, or is it an ancient bund of the Kurichiyendal tank? and (2) whether C and D are mere hollows or long-standing supply channels of the respondents' Ariakudi tank? As regards these issues plaintiffs examined 22 witnesses and defendant's 16, and the Subordinate Judge has correctly set out their evidence. The evidence is conflicting as might be expected, and most of the witnesses on either side are interested in the result of the suit. The Subordinate Judge, however, himself inspected the locality and carefully noted the features likely to assist in coming to a decision as set out in paragraph 85 of his judgment. On reading the evidence together with the reasons mentioned in paragraph 85, we are of opinion that upon the whole the Subordinate Judge has correctly decided both these issues in respondents' favour. Though we do not concur in all the reasons assigned in paragraph 85, we find several of them sufficiently cogent to turn the scales decidedly in favour of the respondents.

"We dismiss this appeal with costs."

From this decision the plaintiffs applied for leave to appeal to His Majesty in Council on the ground that substantial questions of law were involved and the judgments of the two Courts which had decided against the plaintiffs were not entirely concurrent. In granting leave the High Court said :—"There seems to be a point of law, which however does not appear to have been argued here, and it is therefore hereby certified that, as regards the subject-matter and the nature of the questions involved, the case fulfils the requirements of section 596 of Act XIV of 1882."

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On this appeal the respondents lodged a case, but did not appear at the hearing. The appeal was therefore heard *ex parte*. The reasons given in the appellants' case why the decisions of the Courts below should be set aside were, (1) because the findings on issues Nos. 9 and 10 are against the weight of evidence; (2) because upon the facts and findings in this case the permissive flow of the rain water through the plaintiffs' land did not constitute an easement in favour of the defendants; (3) because no recurrence through successive years of such a flow could create a prescription in favour of the defendants, or deprive the plaintiffs of their right to stop or divert the water on any future occasion.

On 2nd and 3rd December 1901 Mr J. D. Mayne for the appellants

Afterwards on 3rd December 1901 the judgment of their Lordships was delivered by Lord Macnaghten.

JUDGMENT.—Their Lordships are of opinion that this appeal must be dismissed.

There is no question of law. The facts have been found by two Courts; and there being two concurrent findings of fact, the decree that was pronounced by the lower Court, and affirmed by the High Court, must be sustained.

In their Lordships' opinion the High Court ought not to have given leave to appeal in this case. The Code is clear upon the point. The words are :—"Where the decree appealed from affirms the decision of the Court, immediately below the Court passing such decree, the appeal must involve some substantial question of law."

Now in the present case, Mr. Mayne has had considerable difficulty in stating what the question of law is, and the Court that gave the leave to appeal seems to have had equal difficulty, because they say in their order :—"There seems to be a point of

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law, which however does not appear to have been argued here"; and upon that ground they have given leave to appeal.

That appears to their Lordships to be utterly contrary to the provisions of the Civil Procedure Code. In their Lordships' opinion no leave ought ever to have been given; and the appeal must be dismissed.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed.

The respondents must have their costs up to the lodgment of their case.

Appeal dismissed.

Solicitor for the appellants: Mr. R. T. Tasker.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Davies, Mr. Justice Benson, Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

1900.
November 29.
1901.
September
17, 18, 23.
October 9.
1902.
January 20.

NARAYANA AYYAR (PLAINTIFF), APPELLANT,

v.

VENKATARAMANA AYYAR AND OTHERS (DEFENDANTS),
RESPONDENTS.*

*Transfer of Property Act—Act IV of 1882, s. 55 (e)—“English mortgage”
Covenant for reconveyance not limited to time stipulated for repayment of
mortgage money—Limitation Act—Act XV of 1877, s. 19, sched. II, art. 117—
Suit for foreclosure and sale in the alternative or for sale—Deposition in
previous suit of a defendant acknowledging liability—Acknowledgment by agent
—Authority of co-mortgagor merely as such, insufficient—Acknowledgment by
managing member insufficient where original dealings have been with all the
members of the undivided family.*

By a deed bearing date 1st August 1882, three defendants mortgaged certain immovable property to plaintiff to secure an advance of Rs. 7,000. On 16th April 1885, the mortgagors executed a written acknowledgment of their liability in respect of that advance. Plaintiff instituted a suit against the mortgagors, on 21st April 1897, to recover the amount due under the mortgage, and in default of payment thereof, for sale of the mortgaged property. The plea of limitation

* Appeal No. 166 of 1899 against the decree of J. A. DeRozario, Acting Subordinate Judge of Nilgiris at Ootacamund, in Original Suit No. 15 of 1897.

was raised. First defendant admitted in evidence that he had, in July 1889, deposed in a suit in another Court, in which he and his co-mortgagors were co-defendants, that their estate was under mortgage; and he also stated (in his evidence in the present suit) that the debt of Rs. 7,000 due to the plaintiff had not been discharged at the time when that deposition was given. Both depositions were signed by first defendant:

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Held, by Sir ARNOLD WHITE, C.J., and BHASHIAM AYYANGAR, J.:—That the suit was not barred as against first defendant. For the purposes of section 19 of the Limitation Act, the acknowledgment relied on must, on the face of it, purport to be that of an existing liability. But the name of the creditor to whom the debt acknowledged is owing, as also the identity of the debt acknowledged in writing, may be proved by parol evidence. *Dair Chand v. Sarfraz*, (I.L.R., 1 All., 117), *Uppi Huji v. Mamnavan*, (I.L.R., 16 Mad., 366), and *Padmanabhan Nambudri v. Kunhi Kolendan*, (5 M.I.C.R., 320), followed. *Mylapore v. Yeo Kay*, (L.R., 14 I.A., 168; I.L.R., 14 Calc., 801), referred to.

Held also, that the acknowledgment by first defendant could not affect a co-mortgagor, or save the suit from being barred as against him, there being no ground, apart from his position as co-mortgagor, for the inference that the first defendant acted as an agent duly authorized to make an acknowledgment within the meaning of section 19, explanation 2. An agency, within the meaning of that explanation, cannot be inferred from the mere fact that the person making the acknowledgment is a joint contractor.

When a creditor deals, not with the managing member only of an undivided family, but with all the members of the family, as co-obligors, and on that footing enters into a transaction,—thereby avoiding any question as to whether the transaction was really for the benefit of the family,—he cannot rely upon an acknowledgment of the liability, made by one of them, as an acknowledgment duly made on behalf of all the co-obligors, by reason only that the person acknowledging is in fact the managing member of the family consisting of the co-obligors. There may, however, be cases in which that circumstance, coupled with the conduct of the joint contractors, may warrant the conclusion that, as a matter of fact, the managing member was duly authorized to make the acknowledgment on behalf of all.

The three essentials of an English mortgage, as defined in section 58 (e) of the Transfer of Property Act, are (1) that the mortgagor should bind himself to repay the mortgage money on a certain day, (2) that the property mortgaged should be transferred absolutely to the mortgagee, (3) that such absolute transfer should be made subject to a proviso that the mortgagee will reconvey the property to the mortgagor, upon payment by him of the mortgage-money on the day on which the mortgagor bound himself to repay the same.

A deed of mortgage recited that the mortgagors “hereby mortgage and assign to the mortgagee” the mortgaged property.

Somhle, that (though it was doubtful if such an assignment was really an absolute one) the assignment was sufficient to fulfil the second requisite of an “English mortgage.”

The proviso for reconveyance in the deed was as follows:—“Upon repayment to the mortgagee of all sums due to him by the mortgagors the mortgagee shall reconvey the said property to the mortgagors,” etc..

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Held, (by the same Division Bench), that the transaction could not be regarded as an English mortgage, there being no words importing that the covenant to reconvey was dependent upon the repayment of the mortgage-money being made at the stipulated time and that it should not be enforced in default of repayment at that time.

On the question what article of the Limitation Act governs a suit for sale by a mortgagee under such a mortgage deed.

Held, by the FULL BENCH, that the period of limitation was governed by article 117. That article applies to a suit by a mortgagee whether it is for foreclosure or sale, and, in the former case, whether the prayer in the plaint is for foreclosure alone, or is coupled with a prayer in the alternative for sale in lieu of a decree for foreclosure. *Pamachandua Hajajun v. Madhu Padhi*, (I L R, 21 Mad, 326), and *Gurur Singh v. Thakur Narain Singh*, (I L R, 14 Cal, 730), dissented from.

SUIT to recover Rs 11,000 alleged to be due on a mortgage, and, in default of payment, for sale of the mortgaged property.

Plaintiff alleged that he was the owner of a moiety of the Tiavakul coffee estate and that the three defendants were the owners of the other moiety, that for the past 12 years he and defendants had worked the estate in partnership under an oral agreement, he being the managing partner; that as such managing partner he had advanced considerable sums out of his own money for the upkeep of the estate; that by a mortgage deed dated 20th May 1882, he had mortgaged his half share for Rs 10,000 to the Nulguris and Southern India Lands Investment Company (Limited); that on 4th August 1882 the defendants had mortgaged to him their half share for Rs 7,000; that a deed of further assurance was executed by him and defendants to the said Company on the 16th April 1885; that on the 13th April 1897 the Company transferred their interest to the National Provincial Trustees and Assets Corporation (Limited), who, on the same day, reconveyed the property to plaintiff; that there was now due to plaintiff from defendants Rs. 4,792-12-6 for their share of upkeep and Rs 11,200 for principal and interest under the mortgage of the 4th August 1882 and that he had sent defendants notice of the dissolution of the partnership at will on the 1st April 1897. He claimed that the accounts of the said partnership might (if his accounts were not accepted by defendants) be taken by the Court and the assets thereof realized, and that the defendants might be ordered to pay into Court the balance or reduced balance due from them upon such partnership account and that the debts and liabilities of the partnership (including Rs. 4,792-12-6 the debt

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due to plaintiff for upkeep) might be paid and discharged and that any balance remaining of such assets, after such payment and discharge, might be divided between the plaintiff and defendants, in proportion to their shares in the estate, and if the said assets should prove insufficient the defendants might be ordered to contribute such sums as should be necessary for the payment and discharge of such debts and liabilities. As a preferential claim he asked the Court to order the defendants to pay him the sum of Rs. 7,000 for principal and Rs. 4,200 for interest due on the mortgage, together with interest and costs, and that in default thereof, that the estate and assets might be sold, and that the defendants' half share of the proceeds might be first applied in and towards the payment of the amount of Rs 11,200 for principal and interest and costs, and that if the proceeds should not be sufficient for the payment of these in full, the defendants should pay to the plaintiff the amount of the deficiency with interest until realization.

Defendants Nos. 1 to 3 admitted that they and second defendant owned one moiety and plaintiff the other moiety of the estate, and that a mortgage bond for Rs. 7,000 had been executed in favour of plaintiff but they challenged plaintiff's accounts, claiming that if an account were taken a balance would appear in their favour. They pleaded that plaintiff's claim was barred by limitation and that the suit was not maintainable as the partnership still subsisted.

Second defendant did not appear.

The deed of mortgage of 4th August 1882, executed by the defendants in plaintiff's favour, was filed as exhibit A, and witnessed that in "consideration of the sum of Rs. 7,000 paid to the mortgagors [defendants Nos 1 2 and 3] by the mortgagee [plaintiff] (the receipt whereof the mortgagors do hereby acknowledge) they the mortgagors do hereby covenant with the mortgagee that they will pay to the mortgagee the sum of Rs 7,000 on the 31st day of December 1882 and will pay interest for the same in the meantime and until final payment of all moneys due hereunder at the rate of 10 per cent per annum half-yearly on the 30th day of June and the 31st day of December in each year without any deduction."

The deed also witnessed that "in consideration of the premises the mortgagors hereby mortgage and assign to the mortgagee the coffee estates" (described in a schedule). The deed contained

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the following covenant for reconveyance:—"Upon repayment to the mortgagee of all sums due to him by the mortgagors, the mortgagee shall reconvey the said property to the mortgagors, their executors, administrators and assigns or as they or he should direct at their or his request and costs." Then followed covenants for management and repairs, inspection, repayment by instalments, and a power of sale in case of breach of any of the terms and conditions of the deed.

Prior to the execution of exhibit A, namely, on 20th May 1882, plaintiff had borrowed Rs. 10,000 from the Nilgiris and Southern India Lands Investment Company (Limited), on the security of his half share in the Havakul estate.

On 16th April 1885, that Company required further security. Accordingly, by a document (filed as exhibit C, dated 16th April 1885), plaintiff assigned to the Company his interest under exhibit A and plaintiff and defendants jointly assigned to the Company the entire estate, as further security for their advance, a proviso for redemption being added.

It was admitted (before the Acting Subordinate Judge) that by an oral agreement between plaintiff and defendants, the former was to manage the whole estate and work it on his and their behalf, and that in fact plaintiff had so worked the estate until 1st April 1897, when plaintiff had terminated that agreement.

On 13th April 1897, plaintiff paid off the balance due by him under his mortgage to the Nilgiris and Southern India Lands Investment Company (Limited), and obtained a reconveyance from the assignees of that Company.

Plaintiff now sued defendants as above for the amount alleged by him to be due by them, as partners, for the upkeep of the estate, and for the amount due on the mortgage of 4th August 1882 (exhibit A).

The Acting Subordinate Judge held that the partnership had been dissolved by plaintiff's letter on 1st April 1897, and that the suit was maintainable.

On the question of limitation he held that the claim on the mortgage was governed by article 132 of schedule II of the Limitation Act, under which plaintiff was bound to sue within 12 years of the money becoming due. By exhibit A, payment was due on 31st December 1882. Since then, exhibit C had been executed by defendants which contained an acknowledgment of the debt

by them on 16th April 1885, and so gave a fresh starting point for limitation. He held that the latest date upon which plaintiff could file his suit upon the mortgage was 16th April 1897. The suit had in fact been filed on 27th April 1897, and he held it to be barred, as against defendant Nos. 1 and 3. With regard to defendant No. 2, endorsements had been made by him on exhibit A (filed as exhibit C1 series) purporting to show that interest had been paid from time to time and acknowledging liability to the plaintiff, under exhibit A. The Subordinate Judge held these to be collusive and valueless, as against the other defendants, and gave a decree against second defendant alone for the amount due under the mortgage exhibit A.

With regard to the claim in respect of the upkeep of the estate, he held all the defendants liable and decreed against them for half the sum so expended, which amounted to Rs 1,808-3-0.

Plaintiff preferred this appeal.

The case came on for hearing on 29th November 1900, when the Court (Sir ARNOLD WHITE, C.J., and SUBRAHMANIA AYYAR, J.) called for further evidence. Defendant No. 1 then admitted that he had, on 27th July 1889, given a deposition (filed as exhibit EE) in Original Suit No. 616 of 1888, in the Court of the District Munsif at Udamalpet, in which the present three defendants were also defendants. In that deposition defendant No. 1 had stated that "our proprietary right in the said coffee estate is mortgaged by us three under a registered deed for the sum of Rs 7,000." When questioned as to this deposition, before the Subordinate Judge, he said—"At that time this estate was in our possession. When this deposition was given the hypothecation debt in question had been discharged. The entire balance of Rs. 7,000 had been discharged when that deposition was given. There was no balance outstanding on the debt." He, however, said, in answer to the Subordinate Judge—"The debt of Rs. 7,000 due to the plaintiff had not been discharged when the deposition was given. When I said above that the debt of Rs. 7,000 had been discharged I was thinking of a debt of Rs. 3,000 due to one Subbaramayyar, which had been discharged and I said so." Both depositions were signed by defendant No. 1.

After receipt of further evidence, the case again came on for hearing on 17th, 18th and 23rd September 1901 before Sir ARNOLD WHITE, C.J., and BHASHIAM AYYANGAR, J.

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Kasturiranga Ayyangar for appellant:—The Subordinate Judge has held that the instrument in question is an English mortgage, but that as the suit is only for sale and not for foreclosure or sale, article 147 of the Limitation Act giving a period of sixty years does not apply. The Subordinate Judge is clearly wrong. If, as I contend and as the Subordinate Judge has held rightly, the document is an English mortgage, article 147 applies notwithstanding that there is no prayer for foreclosure. In this view *Ramachandra Rayaguru v. Modhu Padhu*(1) and *Girwar Singh v. Thakur Naram Singh*(2) are in my favour [BHASHIAM AYYANGAR, J.:—How is this an English mortgage?] English mortgage is defined in section 58 (c) of the Transfer of Property Act, and this document is in the form and contains all the elements of a mortgage deed in English Conveyancing. See Encyclopædia of English law, under “mortgage” Also Davidson’s ‘Precedents of Conveyancing’. The words in the second paragraph of the deed “mortgage and assign,” have to be read with all the other parts and conditions of the document and with the obvious intention of the executants. [BHASHIAM AYYANGAR, J.:—In the clause for redemption there is no date fixed] The date for repayment is specified in the first paragraph and the words “upon repayment” in the clause for redemption must be read with it. It should not be construed as if the time for redemption was to be unlimited. Next, whether the document comes strictly within the definition of an English mortgage or not, it is a document according to which the mortgagee is entitled to the remedy of foreclosure or sale under section 67 of the Transfer of Property Act, he being neither the holder of a simple mortgage, nor of a mortgage by conditional sale nor of a usufructuary mortgage. [BHASHIAM AYYANGAR, J.:—In this case the mortgagee would not be entitled to foreclosure because there is no limit of date for exercising the right of redemption.] I submit that reading all the terms of the document and giving them a reasonable construction, the right of redemption is limited by the time fixed for the repayment of the loan. Even if otherwise, I submit that article 147 of the Limitation Act applies to the mortgage in question, and the suit is not barred. Assuming that article 132 is alone applicable as the mortgagee in this case has been and is in possession, the

(1) I.L.R., 21 Mad., 320.

(2) I.L.R., 14 Calc., 730.

last clause of section 20 of the Limitation Act applies to save the bar of limitation. *Brochlehurst v. Jessop*(1). The debt was incurred by all the senior members of the joint family, and, before it had become barred, the managing member gave an acknowledgment of liability in respect of it. Such an acknowledgment gave a fresh starting point for limitation. [BHASHYAM AYYANGAR, J. :—Plaintiff dealt originally with three individuals, and now he wishes to alter their position by showing that they are, in fact, members of an undivided family.] If that is shown, it is submitted that their managing member can bind them by his acknowledgment

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Sivagnanu Mudalur for respondents Nos. 1 and 3 :—In *Mylapore v. Pro Kay*(2), the Privy Council, on section 19, laid down that the acknowledgment of liability must be of liability to the person who seeks to enforce it. The acknowledgment in question here is not to the plaintiff. Nor is there any thing in the acknowledgment from which it could be adduced that liability was to plaintiff. In *Beti Maharani v. Collector of Etawah*(3)—also on section 19—there was a notice by the Court of Wards which was not shown to be directed to plaintiff,—it might equally have applied to another person,—and it was held that the acknowledgment would have been sufficient had it been identified as applying to plaintiff's debt, which had not been shown. [BHASHYAM AYYANGAR, J. :—It must appear with reasonable certainty that it refers to plaintiff's debt.] Then, if the acknowledgment is a sufficient one I submit it is binding only on the defendant who made it and not on his co-defendants. Even if exhibit C is correct, it does not amount in law to an acknowledgment. When the transaction is that of a managing member it may be that he can acknowledge. But when all are co-contractors, one managing member cannot bind others. As regards the deposition, see *Venkata v. Parthasaradhi*(4). [BHASHYAM AYYANGAR, J., referred to *Dara Chand v. Sarfraz*(5).] First defendant only identifies the deposition. Does that refer to this mortgage? [BHASHYAM AYYANGAR, J. :—There is the identity of the amount. There is only one Rs. 7,000. Evidence of the person or the date may be

(1) 40 R.R., 172.

(2) L.R., 11 I.A., 168, 1 I.L.R., 14 Calc., 801.

(3) L.R., 22 I.A., 31, 1 I.L.R., 17 All., 198.

(4) I.L.R., 16 Mad., 220.

(5) I.L.R., 1 All., 117.

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given *alimude* Reference was made to *Woomash Chunder Mookerjee v. Eliza Suguman*(1).] See *Muthia Chetti v. Or*(2), where the question was whether there was a present liability. [BHASHYAM AIYANGAR, J. —No doubt there must be an admission of present liability] Then, the acknowledgment of first defendant does not bind the third defendant. He is only a co-contractor. The act of first defendant cannot be considered as the act of the third defendant's agent.

Kasturwanja Aiyangan replied :—With regard to the acknowledgment in the deposition, he referred to *Uppu Hoyi v. Mammavan*(3) and *Padmanabhan Nambudri v Kunhi Kolandan*(4) [BHASHYAM AIYANGAR, J :—The question is : Is there evidence to go to a jury in this case that the debt acknowledged is the debt sued on?] He contended that the managing member was the accredited agent of the family.

The Court delivered judgment as follows upon the questions arising in the case other than the questions of the period of limitation applicable to the suit, which they referred to a Full Bench

JUDGMENT—This is an appeal by the plaintiff in a suit brought by him on a mortgage bond, dated 4th August 1882, for the recovery from the mortgagors—the defendants—of the sum of Rs. 11,000, for principal and interest due under the mortgage bond, and in default of payment of the same, on a day to be specified by the Court, for sale of the mortgaged property. The suit also embraced another claim against the defendants for a sum of Rs. 4,000 and odd, unconnected with the mortgage, which will be referred to hereafter. The time stipulated in the mortgage bond for re-payment of the mortgage-debt was the 31st December 1882; and in exhibit C, dated 16th April 1885, there was a distinct acknowledgment, within the meaning of section 19 of the Limitation Act, of the defendants' liability in respect of the mortgage sued upon, which under exhibit C was assigned by way of sub-mortgage, by the plaintiff, with the concurrence of the defendants, to a third party, from whose assignee, the plaintiff redeemed it and obtained a re-conveyance on the 13th April 1897

The suit was instituted on the 21st April 1897. The Subordinate Judge of Ootacamund, in whose Court the suit was

(1) 12 W R., (A O J), 2

(3) I L R., 16 Mad., 366.

(2) I L R., 20 Mad., 224 at p 229.

(4) 5 M.H.C.R. 320.

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instituted held that the suit, in so far as it related to the mortgage claim, was barred by the law of limitation as against the first and third defendants, but a decree was passed against the second defendant, who did not appear to defend the suit, for payment of the mortgage money and, in default of payment, for sale of his interest (one-third share) in the mortgaged property. In paragraph 10 of his judgment, the Subordinate Judge applied article 132 of the Limitation Act and held that as twelve years had expired before the date of the suit, from 16th April 1885, the date of acknowledgment in exhibit C, the suit was barred by the law of limitation and he adhered to his view in his order, dated 31d August 1899, rejecting an application for review of judgment, holding that though the mortgage sued upon was an English mortgage, yet the period of sixty years prescribed in article 147 of the Limitation Act was not applicable to this suit, inasmuch as the suit was not for foreclosure, or in the alternative, for sale, but for sale only.

The question chiefly argued in appeal is that the suit was not barred by the law of limitation for the following reasons:—

(i) That the mortgage in question is an English mortgage and the article of the Limitation Act applicable to the suit is 147 and the fact that the prayer in the plaint was only for sale and not for foreclosure and, in the alternative, for sale, makes no difference.

(ii) That even if the mortgage is not an English mortgage, article 147 is applicable to it

(iii) That even if the suit was governed by the period of twelve years prescribed by article 132, the suit is within time for the following reasons:—

(a) That the receipt of the rents and profits of the mortgaged property, by the plaintiff, should be treated as receipt of the same by him as mortgagee and payment by the mortgagors, for the purpose of section 20 of the Limitation Act.

(b) That as the mortgage sued upon was assigned by exhibit C, by way of sub-mortgage, with the concurrence of the defendants—the mortgagors—and the plaintiff redeemed the sub-mortgage only on the 13th April 1897, limitation should run only from that date or, at any rate, the period during which the sub-mortgage existed, should be excluded in computing the period of limitation.

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(c) That there was an acknowledgment of liability in respect of the mortgage in question by the first defendant, in his deposition (now marked exhibit EE), dated 27th July 1889, in Original Suit No. 616 of 1888, in the District Munsif's Court at Udumalpet, in which these three defendants were also defendants and that such acknowledgment should be treated, not only as one made in his own behalf but also as one duly made on behalf of the other co-mortgagors.

(d) That exhibit C1 series, being annual settlements of accounts from 1886 to 1897, made between the plaintiff and second defendant and signed by them, operate as an acknowledgment of liability by the managing member of the undivided family consisting of the three defendants.

The various grounds upon which it has been contended that even if the suit was governed by the period of twelve years prescribed by article 132 the suit is within time, will first be dealt with and the question of English mortgage and the application of article 147 to the suit will then be considered.

iii (a) In considering this ground, it has to be borne in mind, that the plaintiff on the one hand and the three defendants on the other are co-owners of a coffee estate known as the Havakul estate and that the undivided moiety of the defendants was mortgaged to the plaintiff under exhibit A on the 4th August 1882. The possession was to remain with the mortgagors, the mortgagee however having full powers of inspection and in case of default in properly cultivating the said estate, full powers of supervision and superintendence. The mortgagee was also to have the right of entering upon and taking possession of the mortgaged property on the mortgagors' default to discharge all moneys, for the time being, due on the security.

It is not alleged in the plaint that the plaintiff exercised the right of entry and received the produce of the land as mortgagee. But in paragraph 2 of the plaint, it is distinctly stated that plaintiff "under an arrangement made by the plaintiff with defendants has been the managing partner, and, as such, has worked the estate from 1882. He has been submitting accounts to the defendants and as managing partner has advanced considerable sums out of his own money, for the upkeep of the estate." And it is in connection with this arrangement that the plaintiff claims the sum of Rs. 4,000 and odd for the defendants' share in the

expenses of the upkeep of the estate from 1885 to 1896. All the produce of the Ilavakul estate including the defendants' moiety, is credited in the account relating to the management of the estate by the plaintiff as managing partner or, rather, co-owner and not credited, in part or whole, towards the mortgage debt.

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The contention now raised is opposed to the plant and does not seem to have been advanced in the lower Court. It is the result of an afterthought and it is impossible to accede to the argument that it should be now assumed, for the purpose of saving the suit from the bar of limitation, that the plaintiff exercised his right of entry upon the mortgaged property of which he was apparently already in possession as managing co-owner and that he received the produce of the moiety of the estate mortgaged to him, as mortgagee and not as a co-owner managing the whole estate.

ii (b) The contention that limitation should be reckoned, as stated in paragraph 10 of the plaint, from the 13th April 1897, the date of redemption, by the plaintiff, of the sub-mortgage, or as urged in argument, that in computing the twelve years' period of limitation, the time between the 16th April 1885 (the date of the sub-mortgage, exhibit C) and 13th April 1897 should be excluded, is manifestly untenable and no authority or principle was relied upon in support thereof.

iii (c) The first defendant's acknowledgment of liability in respect of the mortgage in question, contained in his deposition before the District Munsif of Udamalpet above referred to, is in these terms:—"Our proprietary right in the said coffee estate is mortgaged by us three, under a registered deed, for the sum of Rs. 7,000." This, in our opinion, is not a mere recital of a liability that once existed, but amounts to an acknowledgment of a liability existing at the date of the acknowledgment; but there is nothing in the deposition itself to show that the mortgage liability therein acknowledged is the one in favour of the plaintiff. The first defendant, in his evidence in the present suit, admitted that he deposed as recorded in exhibit EE, but stated that the hypothecation debt in question—*i.e.*, the mortgage now sued upon—had been discharged when he made the deposition and that there was then no balance outstanding. Immediately afterwards, in answer to a question by the Court, he admitted that the mortgage debt of Rs. 7,000 due to the plaintiff had not been discharged when he made the deposition (exhibit EE) and that it was by mistake he

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stated that the debt of Rs. 7,000 had been discharged when he only meant that a debt of Rs. 3,000 due to one Subharamayyar had been discharged.

The first defendant's deposition in the present case is only referred to as proof that the mortgage liability acknowledged by him in exhibit EE, is the one on which the plaintiff now sues and not for the purpose of construing that acknowledgment as the acknowledgment of a liability then existing.

For the purposes of section 19 of the Limitation Act, the acknowledgment relied upon must on the face of it purport to be that of an existing liability. But the name of the creditor to whom the debt acknowledged is owing as also the identity of the debt acknowledged in writing may be proved by parol evidence [*Dada Chand v Sarfaraz*(1), *Upper Hyr v. Mammaram*(2), *Woomesh Chunder Mookerjee v. Eliza Sagman*(3), *Padmanabhan Nambudiri v. Kunhi Kolendan*(4), *Hartley v Wharton*(5), *Shortt v. Cheek*(6)].

The decision of the Privy Council in *Mylapore v. Ho Kay*(7) in no way militates against this view. All that was therein decided was that the acknowledgment, in order to be within the meaning of section 19, must be an acknowledgment of liability to the person who is seeking to recover possession or some one through whom he claims. In that case it was held that the person whose acknowledgment was relied upon did "not admit that he was liable to be turned out of possession or that any one had a right of possession as against him" and that he did not "make any admission at all to the plaintiff or to any one through whom he claims." It will thus be seen that there was no acknowledgment of any liability at all and no question therefore arose, as to whether, if a liability in respect of the property was acknowledged parol evidence could be given to identify the liability either in respect of the property liable or the debt due or the person to whom it was due.

In our opinion, therefore, the suit is not barred as against the first defendant. But we are clearly of opinion that the first defendant's acknowledgment cannot affect his co-mortgagor—the

(1) I L R, 1 All, 117

(2) I L R, 16 Mad., 366.

(3) 12 W. R., (A O J), 2

(4) 5 M H C R., 320.

(5) 11 A. & E., 334.

(6) 1 A. & E., 57.

(7) L R., 14 I A., 168, I L R., 14 Cal., 801.

third defendant—and save the suit from being barred by limitation as against him. Apart from the first defendant's position as co-mortgagor with the third defendant there is nothing to warrant the inference that the former acted as an agent duly authorised by the latter in making the acknowledgment (explanation 2 to section 19 of the Limitation Act). Under section 21, one of several joint contractors cannot be chargeable by a written acknowledgment made under section 19, by reason only that such acknowledgment is made by another joint contractor. An agency within the meaning of explanation 2 of section 19 cannot be inferred from the mere fact that the person making the acknowledgment is a joint contractor.

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iii (d) Exhibit C1 series bear the signature of the second defendant and if the various acknowledgments therein contained were really made and signed on the dates when they purport to have been made and signed the question will arise as to whether when one of several joint contractors happens to be the managing member of an undivided family consisting of the joint contractors, his acknowledgment would give a fresh starting point of limitation, not only as against himself but also as against his co-contractors or co-mortgagors. But beyond his own statement as plaintiff's witness and that of the plaintiff, there is no evidence that the various acknowledgments evidenced by exhibit C1 series were made and signed on the dates they bear. The evidence shows that for some time past there had been ill-feeling between the second defendant and his brothers—the first and third defendants—and we agree with the conclusion arrived at by the Subordinate Judge that the second defendant is acting in collusion with the plaintiff.

There are various endorsements on the mortgage bond in question, signed by the second defendant, showing that interest has been paid from time to time up to 1896. It is now admitted that no such interest was in fact paid and the plaintiff claims interest on the mortgage-debt from the 31st March 1891. The mortgage bond came back into the possession of the plaintiff, from the sub-mortgagee, only in April 1897, and these various endorsements thereon by the second defendant must have been made subsequent to that date. The whole of the exhibit C1 series is in the handwriting of the plaintiff or the second defendant and none of the coffee estate clerks were taken into confidence in writing any

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portion of the exhibit C1 series. There is very strong reason to suspect that the exhibit C1 series were concocted by the plaintiff, in collusion with the second defendant, for the purposes of this suit, either shortly before or after the institution of this suit.

There being therefore no trustworthy evidence that the second defendant made the acknowledgments in question, on or about the dates they bear, the question as to how far his acknowledgments would affect the other defendants does not really arise. But it seems clear that, when a creditor deals, not with the managing member only of a family, but with all the members of the undivided family as co-obligors and on that footing enters into a transaction—thereby avoiding any question as to whether the transaction was really for the benefit of the family—he cannot rely upon an acknowledgment of the liability, made by one of them, as an acknowledgment duly made on behalf of all the co-obligors, by reason only that the person acknowledging is in fact the managing member of the family consisting of the co-obligors. All that was decided in the Full Bench decision of this Court in *Chinnaya v. Gurunatham*(1) is that when a debt was incurred or contracted by the managing member of an undivided Hindu family and it was kept alive against him by his acknowledgment, a suit against the members of the joint family for the recovery of such debt on the ground that was incurred by the managing member for a family purpose, will not be barred as against any of them. But no case has been cited in which it was held that if two or more persons, who in fact are members of a joint Hindu family, jointly contract a debt, an acknowledgment by one of them will keep the debt alive as against the rest also, by reason only that the person so acknowledging happens to be the managing member of the family. It may well be, however, that, in particular cases, this circumstance, coupled with the conduct of the joint contractors, may warrant a conclusion that as a matter of fact he was duly authorised to make the acknowledgment on behalf of all.

The next questions for consideration are the character of the mortgage-deed and the article of the Limitation Act applicable to it.

We are unable to agree with the Subordinate Judge that the mortgage in question is an 'English' mortgage. The definition

(1) I.L.R., 5 Mad., 169.

of an 'English' mortgage is given in clause (c) of section 58 of the Transfer of Property Act, which came into force on the 1st July 1882 and is therefore applicable to the mortgage deed in question executed on the 4th August 1882. The three essentials of an 'English' mortgage are (1) that the mortgagor should bind himself to repay the mortgage money on a certain day, (2) that the property mortgaged should be transferred absolutely to the mortgagee, (3) that such absolute transfer should be made subject to a proviso that the mortgagee will reconvey the property to the mortgagor, upon payment by him of the mortgage money, on the day on which the mortgagor bound himself to repay the same.

The first requisite is fully satisfied by the mortgage-deed, by the covenant that the mortgagors will repay the mortgage money on the 31st December 1882, there being also a stipulation to pay interest in the meanwhile on specified dates.

But it is at any rate doubtful whether the second requisite is fully satisfied. The absolute transfer of the property to the mortgagee is effected—if it is effected at all—in these terms:—
"The mortgagors hereby mortgage and assign to the mortgagee, the coffee estate described in the schedule hereto, with the buildings, machinery and all immoveable and moveable property now or which hereafter may be upon the same or used in connection therewith, and with all rights, easements and appurtenances thereto." That a conveyancer should seek to effect a transfer of the property and vest the legal estate in the mortgagee by using the verb 'mortgage' is certainly strange. The operative words should be the same as in an absolute conveyance and the transfer should be by conveyance, assignment, demise, or otherwise, according to the nature of the property forming the subject of the mortgage. The property mortgaged in the present case was freehold and the estate of the mortgagors was an estate in fee-simple. As a matter of conveyancing, at any rate, the absolute transfer of such an estate to the mortgagee, by the operative words 'mortgage and assign' is certainly curious. However, having regard to the use of the verb 'assign' in effecting the transfer and the proviso for reconveyance and the presumption made by section 8 of the Transfer of Property Act in the absence of an expression or necessary implication of an intention to the contrary, it may be said that the second requisite of the definition of 'English mortgage' is also fulfilled.

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But it is impossible to hold that the third requisite, viz., that in the event of the mortgagor repaying the mortgage money at the time stipulated, the mortgagee shall reconvey the property,—is fulfilled. The proviso for reconveyance is in these terms:—“upon repayment to the mortgagee, of all sums due to him by the mortgagors, the mortgagee shall reconvey the said property to the mortgagors, their executors, administrators and assigns or as they or he shall direct, at their or his request and costs.”

In the absence of the expression ‘as agreed’ between ‘upon repayment’ and ‘to the mortgagee’ in the above clause, or of other words, in the said clause or in any other part of the instrument, importing that the covenant to reconvey is dependent upon the repayment of the mortgage money being made at the stipulated time and that according to the contract of parties the covenant to reconvey is not enforceable in default of repayment at the stipulated time, it seems to us the transaction cannot be regarded as an English mortgage the very essence of which is that according to the contract of parties there is at law no right of redemption in default of payment on the due date.

In distinguishing one kind of mortgage from another, ‘form’ is of the essence of the transaction and cannot be ignored. It may be that the above omission is either accidental or the result of carelessness on the part of the conveyancer, or it may be that the conveyancer having no knowledge of the doctrine of ‘the equity of redemption’ engrafted by the Chancery Courts upon English mortgages, purposely drafted the clause as he has done, to ensure the right of the mortgagor to redeem and obtain reconveyance on repayment even after the stipulated time.

According to the construction of the mortgage instrument as it now stands, the mortgagor, though he may, in case of default, be liable to be sued by the mortgagee upon the covenant to pay at the time stipulated, may claim redemption and reconveyance on payment at any time after the stipulated date and the mortgagee cannot bring a suit for foreclosure (*Teulon v. Curtis*(1) and *Curtis v. Helmbe*(2)) inasmuch as the right of redemption, even after the expiration of the time stipulated in the covenant for repayment, is secured to the mortgagor by the mortgage instrument itself. The exercise of the equitable right of redemption

(1) 34 R.R., 301.

(2) 8 L.J., (N.S.), Ch., 153, 34 R.R., 305.

after the expiration of the stipulated time,—an equitable right which is contrary to the contract of the parties, is liable to be restrained by a Court of Equity (see Spence's 'Equitable Jurisdiction of the Court of Chancery'—volume II, page 674), but the exercise of a right of redemption existing by the contract of the parties themselves cannot be thus restrained (Robbins on 'Mortgages'—page 14; Fisher on 'Mortgages,' part II, chapter I, paragraphs 10 and 12 and *Thumbasawmy Mudally v Mahomed Hossain Rowthan*(1))

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This appears to be the reason why under the Transfer of Property Act there is no right of foreclosure either in the case of a simple mortgage or of a usufructuary mortgage, as such, but such right is given only in the case of an English mortgage and an Indian mortgage by conditional sale, which corresponds to an English mortgage, in that according to the contract of parties the sale becomes absolute in default of payment of the mortgage money at the stipulated date, but on payment being made at the stipulated date, the sale becomes void or the mortgagor entitled to a reconveyance of the property. Further, in the case of an English mortgage as defined by the Transfer of Property Act, the mortgagor under the Common Law of England can only sue the mortgagee and for breach of covenant to reconvey, if he tenders the mortgage money on the due date. But a Court of Equity would decree redemption and reconveyance, not only if the mortgage money be tendered on or before the due date, but also, even if default be made and the mortgage money is tendered after the due date.

Though it would seem the mortgage in question is not strictly an English mortgage, and the mortgagee has no right of foreclosure, yet, but for the Full Bench decision of this Court in *Ramachandra Rayaguru v. Modhu Padhu*(2) following the Full Bench decision of the Calcutta High Court in *Gurwar Singh v. Thakur Narain Singh*(3), the suit would seem to be governed by article 147 and not by article 132 of the Limitation Act. The transaction is undoubtedly a 'mortgage' and not a mere 'charge.' There is a transfer, to the mortgagee, of an interest and in fact, of ownership, in the mortgaged property; and it is impossible to maintain that the transaction is not a mortgage but that the

(1) L.R., 2 I.A., 241; I.L.R., 1 Mad. 1 at p. 19.

(2) I.L.R., 21 Mad., 326.

(3) I.L.R., 14 Calc., 730.

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coffee estate is simply made a security by way of 'charge' for the payment of money to the mortgagee. If article 147 does not apply the result would be that the suit would be governed by article 120 which prescribes a period of six years for suits for which no period of limitation is specially provided

There is nothing in the Limitation Act to restrict article 147 to English mortgages, and the very fact that it is not restricted like the immediately preceding article (146) to a chartered High Court in the exercise of its ordinary original civil jurisdiction shows that it is one of general application to all suits by a mortgagee for foreclosure or sale.

On principle it is not easy to see why the class of suits referred to in article 147 should be regarded as suits for foreclosure or in the alternative, for sale. Neither under the English law nor under the Transfer of Property Act is there such a class of suits. There seem to be only three descriptions of suits—namely, (i) suits for foreclosure, (ii) suits for sale and (iii) suits for redemption; (*vide* Provincial Small Cause Courts Act, 1887, second schedule, article 6); and there is no fourth class of suits—viz., suits for foreclosure or sale in the alternative. The result of construing article 147 as applying to suits for foreclosure or, in the alternative, for sale, would be that a suit for foreclosure of a mortgage by conditional sale, in regard to which there is no right of sale (section 67 (a), Transfer of Property Act) and in respect of which therefore no suit could be brought for foreclosure or in the alternative for sale, would be governed by article 120 (six years) and not by article 147 (sixty years) of the Limitation Act.

Form No. 109 of schedule IV to the Civil Procedure Code does not appear to proscribe the form for a suit in the alternative for foreclosure or sale. It gives in one the form for a suit for foreclosure as well as for a suit for sale, in both of which the mortgagee is the plaintiff and the mortgagor the defendant. The form is intended to be adopted to either suit according to circumstances. It will be noticed that no form other than No. 109 is given for a suit for sale. In a foreclosure action in England it is recommended that as a general rule it will be well to claim in the alternative a foreclosure or sale (Robbins on 'Mortgages,' page 1018, citing *Jenkin v. Row*(1), *Kerrick v. Saffery*(2)) and there is no objection

(1) 5 De G. & S., 107 at p. 110.

(2) 7 Sim., 317.

in a foreclosure suit under the Transfer of Property Act to take the same course and adopt form No. 109 almost in its entirety. In *Jenkin v. Row*(1) above referred to, the Vice-Chancellor observed that "although the foreclosuro only was asked by the claim, the Court could, without requiring it to be amended, make an order for sale on the present claim."

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A reference to section 86 of the Transfer of Property Act shows that in a suit for foreclosure, the decree, after providing for redemption by the mortgagor,—the defendant in the suit,—declares that, in default of redemption on or before a day to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property. And the second paragraph of section 88 shows that in such a suit the Court may, at the instance of the plaintiff—the mortgagee—or of any person interested either in the mortgage money or in the right of redemption, if it thinks fit, pass a decree for sale in lieu of a decree for foreclosure. It will thus be seen that the suit is only a suit for foreclosure and not one in the alternative for sale, but that in such suit either at the instance of the plaintiff—the mortgagee—or of the defendant—the mortgagor—or of any other party to the suit interested either in the mortgage money or in the right of redemption, the Court may pass a decree for sale instead of a decree for foreclosure [see also section 25 (2) of the Conveyancing Act, 1881, 44 & 45 Vict, cap. 41].

Similarly in every suit for sale, the decree, after providing for redemption by the mortgagor—the defendant—declares that the mortgaged property or a sufficient part thereof be sold, in default of the defendant redeeming the mortgage by payment on or before the day specified in the decree (section 88, paragraph 1, and section 86, paragraphs 1 and 2 of the Transfer of Property Act).

So in a suit for redemption, the decree, after providing for redemption by payment of the mortgage money on or before a date specified in the decree, declares that, if such payment is not made on or before such day, the plaintiff—the mortgagor—shall (unless the mortgage be simple or usufructuary) be foreclosed of his right to redeem, or (unless the mortgage be by conditional sale) that the property be sold. Section 93, paragraphs 2, 3 and 4 of the Transfer of Property Act provides that, if such payment be not made, the

(1) 5 De G. & S., 107 at p. 110.

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defendant—the mortgagee—may either apply for foreclosure absolute or apply for an order absolute that the mortgage property be sold.

The whole scheme of the Act clearly shows that whether the suit be one for foreclosure, or one for sale, or one for redemption, the decree may, according to circumstances, provide for one or other of the remedies also; and this is so because the period of limitation is one and the same for all the three classes of suits. But under the Limitation Acts XIV of 1859 and IX of 1871, while sixty years were prescribed for a redemption suit, no period of limitation was specially prescribed for suits either for sale of mortgaged property or for foreclosure. Under Act IX of 1871, article 132 (corresponding to article 132 of Act XV of 1877) was applied to suits for sale of immoveable property, whether the same was mortgaged or merely charged for the debt and under Act XIV of 1859, clause 12 of section 1, prescribing a period of twelve years for recovery of any interest in immoveable property was applied to the same. These anomalies were removed when Act XV of 1877 was passed which extended the sixty years' period prescribed for redemption of mortgages to suits by a mortgagee for foreclosure or for sale. But in the case of 'charges' on immoveable property not amounting to a 'mortgage,' the period of twelve years was retained for a suit to enforce the charge by sale. It need hardly be added that there is no suit for foreclosure or redemption in the case of a mere 'charge' (section 100, Transfer of Property Act) (*Tennant v. Trinchard*(1)).

Article 135 of Act XV of 1877 does not seem to militate against this principle, for it relates to a suit which in reality is in the nature of a suit in ejectment by a mortgagee against the mortgagor and the twelve years' period is accordingly prescribed by that article.

Whether the Indian Limitation Act XV of 1877 be construed independently of or in conjunction with the Transfer of Property Act, the conclusion to be arrived at seems to us to be the same. The distinction between a mere 'charge' and a 'mortgage' is not one created by the Transfer of Property Act, though it points out the distinction clearly; the distinction existed here prior to the Transfer of Property Act as it always has existed and does exist under the English Law. Moreover, there being no definition of

(1) L.R., 4 Ch. App., 537.

'mortgage' and 'charge' in the Indian Law of Limitation, these expressions will have to be construed in that Act in accordance with their meaning in the substantive law of the land relating to mortgages and charges, which is now embodied in the Transfer of Property Act.

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The view indicated above is fully supported by the Full Bench decisions of the Bombay High Court in *Motiram v. Vitai*(1) and *Datto Dudheshwar v. Tithu*(2) and of the Allahabad High Court in *Shib Lal v. Ganga Prasad*(3), but is opposed to the Full Bench decision of the Calcutta High Court in *Ghunar Singh v. Thakur Narain Singh*(4) and is not in accordance with the opinion of the majority in the Full Bench decision of this Court in *Ramachandra Rayaguru v. Modhu Padhu*(5).

This question of law arising in the case being one of great importance, before this appeal is finally decided, we refer the following question to a Full Bench:—

“Whether a suit for sale by a mortgagee under the annexed mortgage deed (exhibit A) is governed by articles 132, 147, 120 or any other and which article of the Indian Limitation Act?”

— — —

The case came on for hearing in due course before the Full Bench constituted as above

Kasturuanga Ayyangar for appellant:—The question referred for the decision of the Full Bench is what article of the Limitation Act applies to the mortgage in question. [He read exhibit A.] The Subordinate Judge held that the mortgage in question is an English mortgage, but the Divisional Bench which referred the case to the Full Bench dissented from that view. It is submitted that article 147 is applicable to the present case. Article 132 cannot govern it, for it applies only to “charges”, whereas in the present case there is the transfer of at least an interest (if not the whole ownership) in the property. There being something more than a charge, article 132 does not apply. If articles 147 and 132 do not apply, the only other article that can be applicable is article 120, which prescribes a period of six years. A mere charge should not enjoy a longer period of limitation than an interest such as

(1) I.L.R., 13 Bom., 90.

(2) I.L.R., 23 Bom., 408.

(3) I.L.R., 6 All., 551.

(4) I.L.R., 14 Calc., 730.

(5) I.L.R., 21 Mad., 326.

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has been transferred in the present case. The construction put by the majority of the Court in *Ramachandra Rayaguru v. Modhu Padhu*(1), on the phrase "foreclosure or sale," is, I submit, untenable. There are only three descriptions of suits: (1) suits for foreclosure, (2) suits for sale, and (3) suits for redemption. There is not a fourth class, consisting of suits for foreclosure or, in the alternative, for sale, as the case of *Ramachandra Rayaguru v. Modhu Padhu*(1) seems to assume. My contention is that article 147 applies to the present case, even though the mortgage in question is not an "English mortgage,"—as the reterring Bench has decided. It is submitted that article 147 comprises (1) suits for foreclosure, (2) suits for sale, and (3) suits for foreclosure or for sale in the alternative. One distinction between *Ramachandra Rayaguru v. Modhu Padhu*(1) and the present one is that the majority of Judges there held the instrument in question to be a "charge," whether rightly or wrongly; and so applied article 132. The present case is not a charge. It is a mortgage. So article 147 applies. The two learned Judges who differed from the majority in *Ramachandra Rayaguru v. Modhu Padhu*(1) held that the instrument in question there was a mortgage (not a mere hypothecation or charge) and so they applied article 147. The reasoning of those two learned Judges is entirely in my favour. [He was stopped]

Svagnana Muduliar for respondents Nos. 1 and 3:—In construing the Limitation Act of 1877, reference should not be made to the Transfer of Property Act which was passed only in 1882. [On this point he referred to *Akba v. Nanu*(2) and *Ranyasami v. Muttukumarappa*(3).] [BHASHYAM AYYANGAR, J.—Under Act IX of 1871, there was no provision for an English mortgagee suing for foreclosure. The present Act XV of 1877 removed that defect.] I contend that article 147 applies to suits for foreclosure or in the alternative for sale. [He referred to articles 123, 48 and 49, as throwing light on the construction of article 147.] When the Legislature has desired to give a distributive meaning, it has used the word "for" also. [BHASHYAM AYYANGAR, J.—If that contention is right, then a suit for foreclosure only would be governed, not by article 147 or 132, but by the six years' rule prescribed by

(1) I L.R., 21 Mad., 326

(2) I.L.R., 9 Mad. 218 at p. 222.

(3) I.L.R., 10 Mad., 509.

article 120] I am supported by the decisions of the Madras and the Calcutta High Courts. The majority of the Judges in *Ramachandra Rayaguru v. Modhu Padhi*(1) were in favour of my contention.

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JUDGMENT.—In our judgment the period of limitation for a suit for sale under the instrument in question in the present case is that prescribed by article 147 of the second schedule to the Limitation Act.

In *Ramachandra Rayaguru v. Modhu Padhi*(1), Shephard, J., dealt with the case upon the supposition that the instrument then before the Court was a charge not amounting to a mortgage and held that article 132, which relates to suits to enforce by judicial sale payment of money charged on immoveable property, applied.

In the present case it is quite clear that the instrument is a mortgage. In the case referred to, Subrahmania Ayyar, J., was of opinion that the article applicable was article 132, on the ground that the words "by a mortgagee for foreclosure or sale in article 147" referred only to a suit for foreclosure or sale in the alternative. We do not think this is the right construction of the article. For the reasons stated in the order of reference which we substantially adopt, we think the article applies to a suit by a mortgagee whether the suit is one for foreclosure (see sections 86 and 87 and paragraph 2 of section 88 of the Transfer of Property Act), or one for sale (see paragraph 1 of section 88 and section 89 of the Transfer of Property Act), and, in the former case, whether the prayer in the plaint is for foreclosure alone, or is coupled with a prayer in the alternative for sale in lieu of a decree for foreclosure.

We do not agree with the view of the Calcutta High Court that article 147 applies only in the case of an English mortgage, and we agree with the decisions of the Bombay and Allahabad High Courts, in the cases referred to in the order of reference.

(1) I L R, 21 Mad, 326

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Davies, Mr. Justice Benson, Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

1900.
October 31.
1901.
April 24.
August 15.
November
18, 19, 20, 21.
1902.
January 15.
February 10.

MALLIKARJUNADU SETTI (COUNTER-PETITIONER), APPELLANT,
v.

LINGAMURTI PANTULU (PETITIONER), RESPONDENT.*

NARAYANAMURTI AYYAR (PETITIONER—DEFENDANT No. 1),
APPELLANT,

v.

VALLIAPPA CHETTI (COUNTER-PETITIONER—PLAINTIFF),
RESPONDENT.†

KARUPPAN CHETTI AND OTHERS (PETITIONERS IN CIVIL MISCELLANEOUS PETITION No. 253 OF 1900 AND COUNTER-PETITIONERS IN CIVIL MISCELLANEOUS PETITION No. 251 OF 1900), APPELLANTS,

v.

TANDAVARAYA DESIKAR AND ANOTHER (COUNTER-PETITIONER IN CIVIL MISCELLANEOUS PETITION No. 253 OF 1900 AND PETITIONER IN CIVIL MISCELLANEOUS PETITION No. 251 OF 1900), RESPONDENTS.‡

Transfer of Property Act—Act IV of 1882, ss. 88, 89—Application for order for decree absolute—Appeal—Civil Procedure Code—Act XIV of 1882, ss. 244, 310-A, 311, 540—Sale of mortgaged property in execution of mortgage-decree—Proceeding in execution.

Sections 310-A and 311 of the Code of Civil Procedure apply to sales of mortgaged property in execution of mortgage decrees.

* Civil Miscellaneous Second Appeal No. 35 of 1901, against the order of V. Venugopal Chetti, Acting District Judge of Ganjam, in Civil Miscellaneous Appeal No. 9 of 1900 reversing the order of D. Raghavendra Rao, District Munsif of Sompeta, in Miscellaneous Petition No. 1713 of 1899 (Execution Petition No. 458 of 1899 in Original Suit No. 567 of 1898).

† Civil Miscellaneous Appeal No. 48 of 1900, against the order of F. H. Hamnett, Acting District Judge of Coimbatore, in Civil Miscellaneous Petition No. 394 of 1899 (Execution Petition No. 34 of 1899 in Original Suit No. 27 of 1898).

‡ Civil Miscellaneous Appeal No. 156 of 1900, against the order of T. Varada Rao, Subordinate Judge of Madura, East, on Civil Miscellaneous Petitions Nos. 251 and 253 of 1900, in Original Suit No. 68 of 1895.

Kedar Nath Raut v. Kali Churn Ram, (I.L.R., 25 Cal., 703), commented on. *Tirumal Rao v. Syed Dastaghiri Miyah*, (I.L.R., 23 Mad., 286), *Raja Ram Singhi v. Churni Lal*, (I.L.R., 19 All., 205), and *Krishnaji v. Mahadev Vinayak*, (I.L.R., 25 Bom., 104), approved.

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An appeal lies from an order passed upon an application made under section 89 of the Transfer of Property Act.

Per Sir ARNOLD WHITE, C.J., and MOORE, J.—Such an order is not an order made in a proceeding in execution and is not appealable as such. It, however, has the effect of a final decree, and an appeal lies therefrom under section 540 of the Code of Civil Procedure.

Per DAVIES, BENSON and BHASHYAM AYYANGAR, JJ.—An application made under section 89 of the Transfer of Property Act is, in effect, an application for execution of the decree passed under section 88, and an order made thereon is appealable under section 244 of the Code of Civil Procedure. *Ajudhia Pershad v. Baldeo Singh*, (I.L.R., 21 Cal., 818), and *Tara Prosad Roy v. Bhobodeb Roy*, (I.L.R., 22 Cal., 931), discussed.

QUESTIONS, arising on the facts of these three cases—which need not be set out for the purposes of this report—referred to a Full Bench were respectively as follows:—

(i) Whether section 310-A of the Code of Civil Procedure is applicable to a sale of mortgaged property which has taken place in execution of a mortgage decree;

(ii) Whether section 311 of the Code of Civil Procedure is applicable to such a sale;

(iii) Does an appeal lie against an order refusing to make an order absolute for sale upon application made under section 89 of the Transfer of Property Act?

These questions were considered by the Full Bench constituted as above.

With regard to question (i)—

T. Rangachariar argued in the negative:—It is submitted that the sections in the Code of Civil Procedure relating to sales do not apply to sales under the Transfer of Property Act; and that even if they do, section 310-A does not apply. Section 94 of the Transfer of Property Act contains the phrase “sales by the Court under this chapter,” which appears to conclude the question. Moreover, section 96 of the Transfer of Property Act corresponds to section 295 of the Code of Civil Procedure, and if section 295 applies to sales under the Transfer of Property Act, section 96 of the Transfer of Property Act is redundant, except in those districts where the Transfer of Property Act is or was not in force. Again, section 104 of the Transfer of Property Act provides that rules may be framed. That, too, is unnecessary if section 652 of

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the Code of Civil Procedure applies—as rules can be made under the latter section [He referred to *Kedar Nath Raut v. Kali Churn Ram*(1); *Dakshina Mohan Roy v. Srimati Basumati Debi*(2); *Bhagawan v. Ganu*(3) per Ranade, J, at page 651] Even if chapter XIX of the Code applies to sales under the Transfer of Property Act, section 310-A does not. The latter section had not been enacted when the Transfer of Property Act was passed and is wholly inconsistent with section 89 of the later Act. The rule of construction that a special Act governs, in preference to a general Act, where there is conflict, should be applied. There are three classes of suits under the Transfer of Property Act:—(1) for foreclosure under section 86, (2) for sale under section 88, and (3) for redemption under section 92. In a decree for sale, no power is given to the Court to extend the time for redemption; it is bound to make the decree absolute. In suits for foreclosure and redemption, time may be extended. It is inconceivable that the Legislature should have provided that the right of redemption may be taken away under section 93 and yet should give the mortgagor power to get his mortgaged property back under section 310-A of the Code of Civil Procedure. [He referred to *Tanuram v. Gayanan*(4); *Phul Chand Ram v. Nursingh Pershad Misser*(5); *Raja Ram Singh v. Chunni Lal*(6); *Harjas Rai v. Rameshar*(7); *Krishnan v. Mahadev Vinayak*(8); *Tirumal Rao v. Syed Dastaghiri Miyah*(9); *Srinivasa Ayyangar v. Ayyathorai Pillai*(10); *Chinnammal v. Adinath Ayyangar*(11).

Sundara Ayyar argued in the affirmative.—The Code of Civil Procedure does apply. There are many sections in it which relate specifically to sales under mortgage decrees, *e.g.*, section 223(c) and section 295(e), the latter of which seems to be directly referred to in section 97 of the Transfer of Property Act. In making a distribution under section 97 of the Transfer of Property Act, section 295 would have to be kept in view. Sections 320 and 322 also refer specifically to decrees relating to the sale of immoveable property. Section 99 of the Transfer of Property

(1) I.L.R., 25 Cal., 703

(2) 4 Cal. W.N., 474 at p. 479

(3) I.L.R., 23 Bom., 644 at p. 651

(4) I.L.R., 24 Bom., 300

(5) I.L.R., 28 Cal., 73

(6) I.L.R., 19 All., 205

(7) I.L.R., 20 All., 354

(8) I.L.R., 25 Bom., 104.

(9) I.L.R., 22 Mad., 286

(10) I.L.R., 21 Mad., 416.

(11) Civil Revision Petition No. 248 of 1899 (unreported).

Act permits a suit to be brought under section 67, "notwithstanding anything contained in the Code of Civil Procedure, section 43,"—which shows that the Code was intended to apply generally; and again section 85 refers to section 437 of the Code. The exception was made because "it was intended that the whole Code should be applicable. Division F of chapter XIX deals with attachments; and G deals with all executions of decrees and applies to property attached or unattached; whilst rules for sale are in a separate sub-division. [He referred to sections 287, 294, 295 and 304 as all dealing with sales in execution of decrees.] If the Code of Civil Procedure does not apply, there is no provision for carrying out sales under mortgage decrees. Section 104, no doubt, gives and authorizes rules to be framed, but even the rules cannot take the place of provisions in the Code. The real question is whether there is anything inconsistent in the Act and section 310-A. Section 2 (a) of the Act refers to chapter IV of the Code as a whole. The following cases show that section 291 applies to mortgage decrees:—*Kanara Kurup v. Govinda Kurup*(1); *Raja Ram Singh v. Chummi Lal*(2); *Harjas Rai v. Rameshar*(3); *Vallabha Valiya Rajah v. Vedapuratti*(4). The Privy Council apparently regarded section 311 as applying—*Brij Mohun Thakoor v. Rai Uma Nath Chowdhry*(5); *Mahomed Meeria Ravuthar v. Savvasi Vyaya Raghunadha Gopalar*(6):—though the question was not directly raised.

With regard to question (ii).—

Ramachandra Ayyar and *Anantakrishna Ayyar* argued that section 311, Code of Civil Procedure, did not apply to sales held under mortgage decrees. Section 311 professes to apply to cases where "immoveable property has been sold under chapter XIX, Code of Civil Procedure," whereas in the case of mortgage decrees, property is sold under the Transfer of Property Act. Rules regarding such sales are to be framed under the Act, and the provisions of the Code, as such, do not govern such sales. Moreover the Act contains provisions for the execution of such decrees; *e.g.*, in section 89. They argued that, if chapter XIX of the Code applied, there was no necessity for section 89 at all. The present

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(1) I.L.R., 16 Mad., 214

(2) I.L.R., 19 All., 205.

(3) I.L.R., 20 All., 354

(4) I.L.R., 19 Mad., 40.

(5) L.R., 19 I.A., 154, I.L.R., 20 Cal., 8.

(6) L.R., 27 I.A., 17; I.L.R., 23 Mad., 227.

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question had never been directly decided by any of the High Courts or by the Privy Council, though section 311, Code of Civil Procedure, had been impliedly held applicable to sales held under such decrees; but the point had never been directly raised.

S. Subrahmaniam Ayyar, contra, was not called upon.

Judgment was reserved.

With regard to question (ii) the ORDER OF REFERENCE TO THE FULL BENCH was made by DAVIES and MOORE, J.J., and was as follows:—

ORDER OF REFERENCE TO THE FULL BENCH.—“The first question is whether, taking this as an appeal from the order of the Subordinate Judge refusing to pass an order absolute for sale applied for under section 89 of the Transfer of Property Act, such appeal lies.

“It is contended that the appeal lies as from an order passed in execution. This Court has not decided the question whether applications under section 89 of the Transfer of Property Act are or are not applications in execution, while there is a conflict of opinion between the High Courts of Calcutta and Allahabad on the point. Reference may be made to *Ahikunmissa Bibee v. Roop Lal Das*(1), and the decisions therein referred to. The subject is one of importance that is frequently arising of late, and as we are not altogether agreed regarding it, we think it should be determined by a Full Bench, and we accordingly refer the following question to a Full Bench:—

“Does an appeal lie against an order refusing to make an order absolute for sale upon an application made under section 89 of the Transfer of Property Act?”

S. Srinivasa Iyyengar argued in the affirmative —It is submitted that an appeal lies from such an order. (1) because, it is an order passed in execution proceedings and appealable under section 241 of the Code of Civil Procedure, and (2), if not an order in execution, it is a final order even though applied for under section 89 of the Transfer of Property Act; and as such is appealable. The construction most convenient and most in accord with the scheme of the Transfer of Property Act is that an application for an order absolute is a proceeding in execution. All proceedings subsequent to decree are in execution. If the

(1) I.L.R., 25 Cal., 133.

English practice is any guide, it supports that contention *Bank of England v. Vagliano Brothers*(1) and *Narendra Nath Surcar v. Kamalbasini Das*(2) lay down the canon of construction of a Statute. In *Maharajah of Bharatpur v. Ram Kanno Dei*(3), it was assumed by the Judicial Committee to be a proceeding in execution. There is no difference in principle between sections 86 and 87, 88 and 89, and 92 and 93. A mortgagor paying the mortgage-money under section 92 or other sections is in reality giving effect to the decree—that is, causing to be executed the original decree which determines the rights of both parties. If the mortgagor does not execute the decree by paying, the right to do so reverts to the mortgagee, who takes whatever relief he may be entitled to. Under section 87, a defendant is entitled to be put into possession, but that can only be done if he has first become entitled to possession under a decree; and, moreover, the machinery for putting him into possession is machinery of the Court, which can only be exercised as under a decree. So, the order absolute for sale referred to in section 89 is an order in execution of the decree passed under section 88. It may be said that sections 86, 88 and 92 lay down substantive rights and sections 87, 89 and 93 determine the procedure by which those rights are given effect to. The change of wording from “final decree” in the last paragraph of section 87 to “decree absolute” shows that the former expression was misleading, and that there is not a final decree in cases under this Act. [He referred to Ghose on ‘Mortgage’ and Macpherson on ‘Mortgage.’] The Form for sale, No. 128 of the Code of Civil Procedure, only deals with one decree. In an administration suit the form is a “preliminary order.” Moreover, the form No 128 only deals with the entire mortgaged property, which shows that the question as to how much of the mortgaged property should be sold to meet the decree amount can be determined in execution. *Maharajah of Bharatpur v. Ram Kanno Dei*(3) shows this. Form No 129 only contemplates one decree. Section 213 of the Code of Civil Procedure shows that where a preliminary order is contemplated it is provided for—as in sections 213, 214 and 215, in the latter of which a decree is passed for accounts. The “order absolute” referred to in section 89 is defined in the latter portion

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(1) [1891] A.C., 107. (2) L.R., 23 I.A., 18, I.L.R., 23 Cal., 563.

(3) L.R., 28 I.A., 35 I.L.R., 23 All., 181.

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of the section, namely, the order for sale which the Court is to pass on application for an order absolute being made to it. This is shown by section 93. More than one of such orders may be passed, authorizing sale of property until sufficient has been sold to meet the mortgage debt, and this shows that they are orders in execution. Moreover, there cannot be more than one decree in a suit—see the definition. In section 57, by which property may be sold, and which deals with the rights of persons not parties to the suit, a right of appeal is given. No such right is given in the case of applications for orders absolute. The explanation of the omission seems to be that a right of appeal exists under section 244 of the Code of Civil Procedure—such applications being proceedings in execution. In *Kedar Nath v. Lalji Sahai*(1), two out of three Judges held that an order under section 89 was appealable under section 244. In *Akunnissa Bibee v. Roop Lal Das*(2), it is assumed that an appeal lies, the point not being expressly considered, and no reasons being given for the decision arrived at. In *Ajudhia Pershad v. Baldeo Singh*(3), *Poresb Nath Mojumdar v. Ramjodu Mojumdar*(4) is relied on, which has been dissented from by a Full Bench in Madras. An appeal was held to lie, evidently on the ground that the order is a final one. [He referred also to *Doolee Chand v. Omda Khanum*(5); *Tiluck Singh v. Parsotein Proshad*(6); *Tara Prosad Roy v. Bhobodeb Roy*(7); *Siva Pershad Maity v. Nundo Lal Kar Mahapatra*(8); *Phul Chand Ram v. Nursingh Pershad Misser*(9); *Nandram v. Babaji*(10).] In *Bhagawan v. Ganu*(11) it was held that such applications are applications in execution. The decisions in Allahabad are uniform. In *Oudh Behari Lal v. Nageshar Lal*(12), the Full Bench held an application under section 89 to be one in execution. The decree there was transferred, which could only have happened in the case of a final decree. Decrees for specific performance are similar in that they are conditional. Sections 260 and 267 of the Code of Civil Procedure are instances of decrees that are worked out in execution. In *Rahima v. Nepal Rai*(13), an order under

(1) I.L.R., 12 All., 61

(3) I.L.R., 21 Calc., 818

(5) I.L.R., 6 Calc., 377.

(7) I.L.R., 22 Calc., 931.

(9) I.L.R., 28 Calc., 73.

(11) I.L.R., 23 Bom., 644.

(13) I.L.R., 14 All., 520.

(2) I.L.R., 25 Calc., 133

(4) I.L.R., 16 Calc., 246.

(6) I.L.R., 22 Calc., 924

(8) I.L.R., 18 Calc., 139

(10) I.L.R., 22 Bom., 771.

(12) I.L.R., 14 All., 278.

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section 87 was held appealable as an order in execution. *Ram Lal v. Tulsa Kuar*(1) dissents from *Poresb Nath Mojumdar v. Ramyodu Mojumdar*(2). In *Taniram v. Gajanan*(3) an appeal was allowed. [He also referred to *Chunnu Lal v. Harnam Das*(4); *Hira Lal Sahu v. Parmeshar Rai*(5); *Elayadath v. Krishna*(6); *Vallabha Valiya Rajah v. Vedapuratti*(7); *Harendra Lal Roy Chowdhry v. Maharani Dasi*(8); *Sri Rajah Papamma Rao Bahadur v. Sri Vira Pratapa Korkonda*(9); *Maharajah of Bharatpur v. Ram Kanno Dei*(10).]

K. Srinivasa Ayyangar.—The orders under consideration are not passed in execution. Orders passed under sections 87, 89 and 93 are all on the same footing. The putting in possession provided for by section 93 is effected by an order for that purpose, and not in execution of a decree already passed. If section 93 provides merely a means for executing orders or decrees passed under section 92, it should contain provisions for relief,—such as the delivery up of title-deeds and return of the balance of money recovered. Similarly, if section 87 merely provides relief analogous to a warrant of execution, it should contain the reliefs provided by section 86 to be included in the decree. Orders under sections 87, 89 and 93 cannot be orders in execution, as by these orders Courts can vary the decree, e.g., extend time, which cannot be if they merely carry out the decrees. Further it is only on the passing of orders under these latter sections relationship of mortgagor and mortgagee ceases: not by the decree passed under the previous sections. It will be surprising if the relationship ends not by the passing of a decree, but the passing of an order in execution. If the decree under section 88 is a final one, a further suit will not lie,—but this Court has held that a further suit for redemption, under section 92, does lie—(*Ramunni v. Brahma Dattan*(11); *Vallabha Valiya Rajah v. Vedapuratti*(7)) on the ground that the relationship of mortgagor and mortgagee continues to exist if the decree under section 92 has not been acted on. The principle of those decisions is equally applicable to suits for foreclosure and sale. Even if the decree is

(1) I L R, 19 All, 180

(3) I L R, 24 Bom, 300.

(5) I L R, 21 All, 356.

(7) I L R, 19 Mad, 40.

(1) L R, 23, 1 A 32, I L R, 19 Mad, 249.

(10) L R, 28 L.A., 35, I L R., 23 All, 181

(11) I.L.R., 15 Mad, 306.

(2) I L R, 16 Calc. 246.

(4) I L R, 20 All, 302

(6) I L R., 13 Mad., 267.

(8) L R, 28 L.A., 89, I.L.R., 28 Calc., 557.

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final as regards the mortgagor, it does not follow that it is so as regards the mortgagee. See Broom's 'Legal Maxims,' 6th edition, page 322. The decision in *Kanara Kurup v. Govinda Kurup*(1) has been disapproved in *Vallabha Valiya Rajah v. Vedapurattu*(2), but not the reasoning. It is significant that section 93 is inconsistent with section 203 of the Code of Civil Procedure, though both Acts were passed practically simultaneously. In Fisher on 'Mortgage,' the phrase "order absolute" is used throughout. Form No. 129 of the Code of Civil Procedure has the word "order," which is consistent with the view that the Code contemplates but one final decree. This is supported by Forms Nos. 130, 131 and 132. The intention of the Legislature is also shown by section 87 in the last clause. [He referred to Seton on 'Decrees,' volume II, page 1087, under the heading of "Forms for Foreclosure and Sale;" section 396 of the Code of Civil Procedure relating to partition; *Jogodishury Debea v. Karlash Chundra Lalury*(3), *Dwarka Nath Misser v. Barinda Nath Misser*(4), *Shah Muhammad Khan v. Hamwant Singh*(5), on the same point; also to section 212 of the Code of Civil Procedure as to mesne profits; *Puran Chand v. Roy Radha Krishen*(6); *Ram Krishore Ghose v. Gopi Kant Shaha*(7); *Subrahmaniam Pillai v. Narayana Ayyangar*(8) and *Rayalu Pattar v. Narayana Pattar*(9) referred to in *Venkatarazu v. Chinna Ramayya*(10) on the same point; *Narayana Reddi v. Papayya*(11); *Venkata Krishna Ayyar v. Thiagaraya Chettu*(12).] No reasons for the decisions that these are applications in execution are given in *Ram Lal v. Narain*(13) and *Oudh Behari Lal v. Nageshar Lal*(14), and the former has been dissented from. *Ranbir Singh v. Drigpal*(15) has also been dissented from in *Chunni Lal v. Harnam Das*(16). *Mahabir Prasad v. Sital Singh*(17) supports my contention. In Bombay it is held that a second suit does not lie for

(1) I.L.R., 16 Mad., 211.

(2) I.L.R., 19 Mad., 40.

(3) I.L.R., 24 Calc., 725.

(4) I.L.R., 22 Calc., 425.

(5) I.L.R., 20 All., 311.

(6) I.L.R., 19 Calc., 132.

(7) I.L.R., 28 Calc., 242.

(8) Appeal against Appellate Order No. 35 of 1898 (unreported).

(9) Appeal against Appellate Order No. 39 of 1899—see I.L.R., 24 Mad., 699—Footnote.

(10) I.L.R., 24 Mad., 695.

(11) I.L.R., 22 Mad., 133.

(12) I.L.R., 23 Mad., 521

(13) I.L.R., 12 All., 539

(14) I.L.R., 13 All., 278.

(15) I.L.R., 16 All., 23.

(16) I.L.R., 20 All., 302.

(17) I.L.R., 19 All., 520.

redemption. [He also referred to *Muhammad Ali v. Debi Din Rai*(1).]

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S. Srinivasa Ayyangar, in reply, referred to *Day v. Kelland*(2), as showing that the decree is the final adjudication and that nothing remains, but to work it out in execution; and pointed out that the decree is made absolute by *ex parte* motion as of course, whereas if it were a motion for judgment, it should be with notice. Daniell's 'Chancery Practice,' volume II, part I, page 1405. He referred also to Order xlii, Rule 9; Order lv, Rule 14; *Whiting v. Bank of United States*(3) where Story, J., regards the original decree for foreclosure and sale as final and considers that the title of a purchaser under it would not be extinguished even if the decree should be finally reversed, the ulterior proceedings being merely a mode of executing the first decree. He also referred to *Chicago & Vincennes Railroad Company v. Frostdich*(4); *Karuthasami v. Jaganatha*(5); *Hari Rary Chiplunkor v. Shapurji Hormusji*(6); *Nannappa Chetti v. Chidambaram Chetti*(7); *Erusappa Mudaliar v. Commercial and Land Mortgage Bank, Limited*(8); *Venkata Krishna Ayyar v. Thiagaraya Chetti*(9); *Narayana Reddi v. Papayya*(10); *Sri Rajah Papanma Rao Bahadur v. Sri Vira Pratapa Korkonda*(11); *Akikunnissa Bibee v. Roop Lal Das*(12); *Thakur Pershad v. Sheikh Fakir-ullah*(13); *Monkhouse v. The Corporation of Bedford*(14).

Sir ARNOLD WHITE, C.J.—In Appeal against Appellate Order No. 35 of 1901 and Appeal against Order No. 48 of 1900:—The questions which have been referred to a Full Bench in these cases are—do sections 310-A and 311 of the Code of Civil Procedure apply in the case of a sale in execution of a mortgage decree?

First, as regards section 310-A. The Transfer of Property Act came into force on 1st July 1882. Section 310-A was introduced into chapter XIX of the Code in 1894. Part I of the Code in which chapter XIX occurs is headed "of suits in general" and chapter XIX is headed "of the execution of decrees." Chapter IV

(1) I.L.R., 4 All., 420.

(3) 13 Peters, 6 at p. 15

(5) I.L.R., 8 Mad., 478.

(7) I.L.R., 21 Mad., 18.

(9) I.L.R., 23 Mad., 521.

(11) L.R., 23 I.A., 32, I.L.R., 19 Mad., 249 at p. 252.

(12) I.L.R., 25 Calc., 183.

(14) 17 Ves., 380.

(2) [1900] 2 Ch., 745.

(4) 106 U.S. Rep., 47.

(6) L.R., 13 I.A., 66, I.L.R., 10 Bom., 461.

(8) I.L.R., 23 Mad., 377.

(10) I.L.R., 22 Mad., 133.

(13) L.R., 22 I.A., 44; 1 L.R., 17 All., 106.

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of the Transfer of Property Act deals with the substantive law of mortgage, and with the rights of mortgagors and mortgagees, and also, to a certain extent, with the procedure whereby these rights may be enforced. The last section of the chapter (section 104) empowers the High Court to make rules consistent with the Act for carrying out the provisions contained in the chapter. As regards the Appellate Side of this High Court the powers conferred by this section have not been exercised. This, as it seems to me, is an accident, which does not affect the question of construction which we have to determine.

Apparently, the scheme of the Legislature in framing the mortgage chapter of the Transfer of Property Act was that substantive rights should be dealt with in the Act, and that the procedure for giving effect to these rights should be governed by rules made under the authority of the Act. In my opinion, however, it was not the intention of the Legislature that the Code of rules contemplated by section 104 should be an exhaustive and self-contained Code. I think it was intended that the special rules should be supplementary to the existing general rules of procedure which were applicable to the subject-matter dealt with in chapter IV, and it seems to me that if the Legislature had intended that the Code of rules which they contemplated for the purposes of the Transfer of Property Act should oust the provisions of the Code of Civil Procedure, the rules would have found a place in the body of the Act. A rule which went beyond the powers conferred by section 104 would, of course, as a rule made under these powers, be *ultra vires*, and it may also be that a rule which was within the powers conferred by the section, but inconsistent with some general provision of the Code, would also be *ultra vires*, but this question does not now directly arise.

It is to be observed that sections 310-A and 311 in terms apply where immovable property has been sold "under this chapter," i.e., under the chapter XIX of the Code. In my opinion when immovable property is sold in execution of a mortgage-decree it is sold under, or by the authority of, the special provisions of the Transfer of Property Act which authorise the Court to order the sale. It seems to me, however, that the sale is also "under" the general procedure sections of the execution chapter of the Code which relate to the sale of land in execution of a decree and which are not in conflict with any special statutory enactment relating

to mortgages and mortgage suits I think the sale of land in execution of a mortgage-decree may be said to be "under" such general provisions of the Code as well as "under" the special provisions of the Transfer of Property Act

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But there remains, of course, the further question, did the Legislature intend that section 310-A should apply to a sale in execution of a mortgage-decree?

It is to be borne in mind that the section was inserted in the Code some twelve years after the Transfer of Property Act came into force. The saving clause to section 2 of the Transfer of Property Act only applies to existing enactments at the time the Transfer of Property Act came into operation. Section 310-A applies generally to the sale of immoveable property in the execution of a decree and enables the person whose property has been sold on payment into Court of the prescribed deposit to apply to have the sale set aside, and, if the deposit is made within the prescribed time, the Court is required to set aside the sale. Strictly speaking the section is not a procedure section at all. It does not provide the machinery to enforce a right to which the person whose property has been sold is entitled either in law or in equity. It confers a substantive right.

The fact, however, that the Legislature introduced the enactment as a supplementary section to the execution provisions of the Code, and the fact that the section is perfectly general in its terms suggest that the Legislature did not intend that the operation of the section should be limited to sales under decrees which had been obtained in suits other than mortgage suits.

The test to apply is,—are the general provisions of section 310-A consistent, and can they be read together, with the special provisions of the enactment which deals with the special subject-matter of the law of mortgage? If the general provisions of the section are inconsistent with the special provisions of the Act, then on the principle *generalia specialibus non derogant* I think the section ought not to be construed as applying to sales in execution of mortgage-decrees. After, I confess, considerable doubt, I have come to the conclusion that there is no real inconsistency and that section 310-A was intended to apply to sales in execution of mortgage-decrees. No doubt the Transfer of Property Act by special enactment regulates the rights of the party whose property the Court has ordered shall be sold in default of compliance with

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the orders of the Court with regard to payment. Under the foreclosure sections of the Act (sections 86 and 87) the Court is empowered to postpone the day appointed for payment by the mortgagor. Under the corresponding redemption sections (sections 92 and 93) the Court is empowered to extend the time for payment. Under sections 88 and 89, which deal with suits for sale, no such power is given. It would seem, therefore, that the Legislature advisedly refrained from giving to the Court a power to extend the time for payment where, in a suit for sale, the Court had ordered that, in default of payment in pursuance of the order of the Court, the property should be sold. Now, no doubt, section 310-A confers rights which are outside and beyond any rights given by the Transfer of Property Act, but I do not think the section can be said to confer any further right to redeem. Sections 89 and 93 provide that, on the making of an order absolute under either of these sections, the right to redeem and the security shall both be extinguished. The sections say in effect that on the making of the order absolute the relation of mortgagor and mortgagee shall come to an end. As it is put by Sir Muttusami Ayyar, J., in *Ramunni v. Brahma Dattan*(1):—"Between the dates of the order for sale and that of the actual sale the position of the plaintiff is that of a judgment-debtor whose property has been ordered to be sold in execution, and he may pay the money as a judgment-debtor and thereby obviate the necessity for the sale." See, too, the observations of Shephard, J., in *Vallabha Vaitya Rajah v. Vedapuratti*(2), and Macpherson on the 'Law of Mortgage in British India,' 7th edition, page 697. Section 310-A does not, as it seems to me, have the effect of extending the time for redemption, because, at the time the section comes into operation, the right to redeem no longer exists and the parties are no longer in the relation of mortgagor and mortgagee. Their position is that of judgment-debtor and judgment-creditor, and their rights are governed by the provisions of the Code which relate to parties in that position.

It seems to me, therefore, that both section 291, which empowers the Court to adjourn a sale in execution of a decree, and section 310-A, which requires the Court to re-open a sale which has actually taken place, on the requirements of the section being complied

(1) I.L.R., 15 Mad., 366 at p. 370.

(2) I.L.R., 19 Mad., 40, at p. 43.

with, are consistent with the special provisions of the Transfer of Property Act. Section 310-A no doubt affects the rights of a purchaser, whilst section 291 concerns only the parties to the suit, but this does not seem to be a sufficient reason for drawing a distinction between the sections. If a purchaser of immoveable property which is sold in execution of a decree other than a mortgage-decree buys subject to the risk of the transaction being set aside on an application made within thirty days after the date of sale by the person whose property has been sold—and the Legislature has so enacted in unmistakable terms—there seems, on principle, to be no reason why the purchaser of immoveable property which is sold in execution of a decree obtained in a mortgage suit should not buy subject to the same risk. The hardship (if any) to the purchaser is the same in both cases.

As regards the authorities, so far as this High Court is concerned, it appears to have been assumed in *Srinivasa Ayyangar v. Ayyathurai Pillai*(1) that section 310-A applied to a sale in execution of a mortgage-decree, and in *Tirumal Rao v. Syed Dastaghiri Miyah*(2) it was expressly so decided. In the latter case the learned Judges declined to follow the decision of the Calcutta Full Bench in *Kedar Nath Raut v. Kali Churn Ram*(3). The Calcutta Full Bench decision proceeded mainly on the question whether section 310-A applied to sales under decrees in mortgage suits by virtue of the rules framed by the Calcutta High Court under the powers conferred by section 104 of the Transfer of Property Act, though no doubt the Court also decided, incidentally, that the section itself did not apply. The decision on this point, however, was based on the view that the sale in execution of a mortgage decree did not take place “under” chapter XIX of the Code. With all respect, it seems to me (as I have said) that although the power to order the sale is given by the Transfer of Property Act, and, therefore, in a sense, is “under” that Act, the sale is also “under” chapter XIX of the Code.

I agree with the conclusions of the Allahabad High Court in *Raja Ram Singhji v. Chunni Lal*(4) and with those of the Bombay High Court in *Krishnaji v. Mahadev Vinayak*(5). As regards

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(1) I.L.R., 21 Mad., 416.

(3) I.L.R., 25 Calc., 703.

(5) I.L.R., 25 Bom., 104.

(2) I.L.R., 22 Mad., 286.

(4) I.L.R., 19 All., 205.

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section 310-A, I think the question should be answered in the affirmative

As regards section 311, I have felt no difficulty. At the time the Transfer of Property Act was passed the enactment which is reproduced as section 311 of the Code had long been in existence. In passing the Transfer of Property Act the Legislature must be taken to have had in mind the existence of such a general provision.

Section 2 of the Transfer of Property Act provides that nothing in that Act shall be deemed to affect the provisions of any enactment not thereby expressly repealed. There is, moreover, nothing in the general provisions of the section which can be said to be in conflict with the special provisions of the Transfer of Property Act. The section neither restricts nor extends the rights conferred by that Act. It confers a power which, apart from express enactment, may be said to be inherent in every Court—a power to set aside proceedings which are vitiated by a material irregularity which has occasioned substantial injury.

As regards section 311, I think the question should be answered in the affirmative

In Appeal against Order No 156 of 1900—The question which has been referred to us in this case is—does an appeal lie against an order refusing to make an order absolute for sale upon an application made under section 89 of the Transfer of Property Act?

The order of reference is in general terms, but the point for determination is, whether the order in question is an order made in execution proceedings to which section 244 of the Code of Civil Procedure applies. The conflict of authority upon this question is the reason why the matter has been referred for the consideration of a Full Bench.

The point put shortly is—Is a “decree” made under section 88 of the Act a decree which in itself is capable of execution or is it a decree which is merely preliminary or conditional and not capable of execution until the “order absolute” referred to in section 89 has been made?

If the matter had been *res integra* I should have felt little hesitation in holding that where there are two sections dealing with a particular class of suits the first of which empowers the

Court to order that, if there shall be default in payment in pursuance of the order of the Court, something shall be done, and the second of which enacts that when there has been default the Court may make an "order absolute" that the thing be done, there is no complete decree, capable of execution, until the order contemplated by the second section had been made. This appears to me to have been the scheme of the Legislature both in the sections relating to suits for sale (sections 88 and 89) and in the cognate sections relating to suits for foreclosure (sections 86 and 87) and to suits for redemption (sections 92 and 93). Sections 86, 88 and 92 provide for the form of the decree if the plaintiff succeeds, that is to say, if he establishes his right to foreclosure, or sale, or redemption, as the case may be, if payment be not made in pursuance of the order for payment which these sections empower the Court to make. Each of these sections has its correlative or complementary section. Each section contemplates two contingencies. First, that the orders contained in the decrees which the Courts are empowered by the sections to make be complied with; secondly, that they be not complied with; and each of the correlative sections empowers the party to make a further application and authorises the Court to make a further order on the footing, not that something may or may not be done, but on the footing that something has, or has not, been done. The order or decree contemplated by the sections 86, 88 and 92 appears to me to be a preliminary or conditional decree which, in itself, is not capable of execution. Otherwise it is difficult to see why each of these sections should have its correlative section dealing with the legal results which ensue (not which may or may not ensue according as to whether payment is made or not) and empowering the Court to order that certain things shall be done (not that certain things shall be done in a given event). At any rate as regards the foreclosure and redemption sections it seems clear that the Legislature had in mind the well-known practice of the Chancery Division in England and that it was intended that there should be no final adjudication until an order absolute was made. I see no good reason for holding that the Legislature intended that in suits for sale the procedure should be otherwise. If the correlative sections, as I have termed them, did nothing more than provide the machinery for enforcing substantive rights which had been already declared and finally adjudicated upon in the previous sections, there would be more force in the argument that

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the proceedings under the correlative sections were nothing more than proceedings in execution. But this is not the case. For instance, the enactment which empowers the Court to deliver possession of the property to the mortgagee when the Court has ordered that the mortgagor be debarred absolutely of his right to redeem is to be found in section 93 and not in section 92. Again, notwithstanding the "decree" under section 88, the defendant's right to redeem continues to subsist, and the security continues to subsist. It is not until an "order absolute" is made under section 89 that the right and the security are extinguished.

I do not think that the use of the word "decree" in sections 86, 88 and 92 and the word "order" in the correlative sections is in any way conclusive on the question of construction. The correlative sections enact that the order under each of these sections is an "absolute" order, or that its effect is "absolute." To my mind, a much stronger inference is to be drawn from the use of the word "absolute," as contradistinguished from something which is not absolute, than from the use of the word "decree" as contradistinguished from the word "order."

In support of the view that an application for an order absolute is an application in execution of a decree, some stress was laid on the words "if the plaintiff succeeds" in sections 86, 88 and 92. But these words only mean if the plaintiff succeeds in showing that he is entitled to certain relief in the event of the defendant not complying with the order of the Court for payment.

Turning to the authorities, so far as the Madras cases are concerned, there does not seem to be any reported decision on the precise point which is now before us. As regards the decision of the Full Bench in *Vallabha Valiya Rajah v. Vedapuratti* (1), there does not appear to me to be anything either in the actual decision or in the reasoning on which the decision is based which conflicts with the view which I have expressed. In the Privy Council case of *Sri Rajah Papamma Rao Bahadur v. Sri Vira Pratapa Korkonda* (2), their Lordships no doubt observe (see page 253) in dealing with the rights of a simple mortgagee:—"In default of payment a simple mortgage gives to the mortgagee a right not to possession, but to sale, which he must work out in execution

(1) I L R., 19 Mad., 40.

(2) I. R., 23 I. A., 32; I. L. R., 19 Mad., 249 at p. 253.

proceedings." But it seems to me these words have reference to what takes place after the "order absolute" provided for in section 89 has been obtained.

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In *Narayana Reddi v. Papayya*(1) and *Venkata Krishna Ayyar v. Thiagaraya Chetty*(2), the point did not arise but the judgments in both these cases are based on the assumption that the decree is incomplete until the further order, in the nature of an order absolute, has been made. In *Subrahmanium Pillai v. Narayana Ayyangar*(3), this Court held that where there had been no order absolute for sale the decree was incapable of execution. In *Rajulu Pattar v. Narayana Pattar*(4), the judgment went on the ground of estoppel, but the Court observed that there ought in strictness to have been an order absolute for sale before the order for sale was passed, and that if the objection had been taken before the sale took place it might have prevailed. In the most recent reported Madras case in which the question was raised, *Venkatarazu v. Chinna Ramayya*(5), the judgment also went on the ground of estoppel, and the point now before us was expressly left open.

Apparently the Bombay High Court has never had occasion to consider the point, but at any rate, so far as foreclosure and redemption suits are concerned, the view of the Bombay High Court is clear—that decrees under sections 86 and 92 are interim or conditional decrees. See for instance *Nandram v. Babaji*(6). The case of *Bhagawan v. Ganu*(7) turned on a question of limitation.

As regards the Allahabad High Court it was held by a Full Bench of three Judges in *Kedar Nath v. Lalji Sahai*(8), the Chief Justice (Sir John Edge) doubting, that an order under section 87 is an order in execution of the substantive foreclosure decree and is appealable under section 244 of the Code of Civil Procedure. About the same time it was held by a Divisional Bench of the same Court (*Ram Lal v. Narain*(9)) that a decree for sale under section 88 could not be executed unless and until it had been made

(1) I L R., 22 Mad., 133.

(2) I L R., 23 Mad., 541.

(3) Appeal against Appellate Order No. 35 of 1898 (unreported).

(4) Appeal against Appellate Order No. 39 of 1899—See I L R., 24 Mad., 699—Footnote.

(5) I L R., 24 Mad., 695.

(6) I L R., 22 Bom., 771.

(7) I L R., 23 Bom., 644.

(8) I L R., 12 All., 61.

(9) I L R., 12 All., 539.

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absolute by an order under section 89. The question involved in the latter case was afterwards argued before a Full Bench of five Judges, of which Sir John Edge was a member, and the Court overruled the earlier decision and held that an application for an order absolute for sale was a proceeding in execution (*Oudh Behari Lal v. Nageshar Lal*(1)). With all respect, I cannot regard the reasoning upon which the judgment in this case is based as convincing. Sir Douglas Straight, in delivering the judgment of the Court, says:—"Where a decree has been passed under sections 86, 87, 88, 89 or 92 directing payment into Court by a specified date of a sum of money and, in the event of its not being paid, declaring that the foreclosure or sale shall follow, or a right to redeem shall be barred, it would, in my opinion, be a misnomer, if payment is made, to describe such payment as other than one made in execution of decree. On the other hand, it appears equally clear to me that if such payment is not made, the consequences which follow are also matters concerned with the execution of the decree, flowing as a matter of course out of the decree itself, viz., to give it effect against the judgment-debtor for having failed to satisfy the conditions of the decree."

No doubt where payment is made in compliance with a decree directing payment, the payment is in pursuance of, or in obedience to, the decree and, in a sense, is in 'execution' of the decree, but, as it seems to me, it does not follow that the application for the order contemplated by sections 87, 89 and 93 is an application relating to the execution of the decree within the meaning of these words as used in section 244 of the Code of Civil Procedure, or that an order made on such an application is an order made in execution proceedings.

As regards Calcutta, the precise point came before the Calcutta High Court in *Ajudhia Pershad v. Baldeo Smgh*(2) and *Tara Prosad Roy v. Bhobodeb Roy*(3), where it was held that a decree under section 88 could not be executed until it was made absolute under section 89. With regard to the latter case, however, it is to be observed that the learned Judges seem to have relied to some extent on the authority of *Ram Lal v. Naram*(4), and their attention apparently was not called to the decision of the Full

(1) I.L.R., 13 All., 278

(3) I.L.R., 22 Cal., 931

(2) I.L.R., 21 Cal., 818

(4) I.L.R., 12 All., 539.

Bench in *Oudh Behari Lal v. Nageshar Lal*(1), which in effect overruled the earlier decision.

There are other decisions of the Calcutta High Court which support the view that an application under section 89 is an application in the suit as distinguished from an application in execution of the decree, and the distinction is a substantial one notwithstanding the explanation to section 647 of the Code. The cases of *Siva Pershad Manty v. Nundo Lall Kar Mahapatra*(2) and *Phul Chand Ram v. Nursingh Pershad Misser*(3) are decisions the other way.

The conclusion at which I have arrived is that the decisions of the Calcutta High Court (*Ajithna Pershad v. Baldeo Singh*(4) and *Tura Prosad Roy v. Bhobodeb Roy*(5)) are in accordance with the intentions of the Legislature, and that the decision of the Allahabad High Court is not

In my opinion an order on an application under section 89 of the Transfer of Property Act is not an order made in a proceeding in execution and is not appealable as such. Such an order, however, seems to me to have the effect of a final decree, and I think an appeal lies therefrom under section 540 of the Code.

I think, therefore, that the question which has been referred to us should be answered in the affirmative.

DAVIES, J.—In Appeal against Appellate Order No 35 of 1901 and Appeal against Order No 48 of 1900.—There can be no doubt that the provisions of the Code of Civil Procedure are applicable to cases tried under special Acts, if the trials are in a Court of Civil Judicature and if there are no rules in the special Acts inconsistent with, or substituted for, the general rules of the Code of Civil Procedure. Now, in the Transfer of Property Act, after an order for sale in a mortgage suit has been made, no further rules are laid down as to the subsequent steps to be taken for the conduct of the sale and other incidents attaching to it. These matters must therefore be governed by the Civil Procedure Code as the Transfer of Property Act is silent in regard to them. The rules for the conduct of sales by a Civil Court are to be found in chapter XIX (G) of the Civil Procedure Code and there is

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(1) I L R., 13 All., 278.

(3) I.L.R., 28 Calc., 73.

(5) I.L.R., 22 Calc., 931.

(2) I L R., 18 Calc., 139.

(4) I L R., 21 Calc., 818.

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nothing in that chapter excluding from its operation sales in pursuance of mortgage decrees under the Transfer of Property Act. Section 311 of the Code in that chapter provides one mode of rescinding a sale before it has been confirmed, namely, by showing that there was material irregularity in publishing or conducting the sale by which substantial injury was caused. Section 310A provides another mode by which a sale may be rescinded, namely, by allowing the judgment-debtor thirty days' grace under certain conditions for paying up the decree amount on account of which the sale was made. It seems to me that if either of these provisions applies to sales in execution of any decree, including a mortgage decree, the other must also do so. The fact that section 310A was enacted at a later date than section 311 and after the Transfer of Property Act had come into operation cannot, in my opinion, make any difference. Section 310A being incorporated as it is in the Civil Procedure Code, now forms part and parcel of it. When property is sold in execution of a mortgage decree it is not sold as mortgaged property, but as the absolute property of the *quondam* mortgagor treated as a judgment-debtor. It has been restored to his full ownership by operation of law (see sections 87, 89 and 93 of the Transfer of Property Act). Therefore, there is no reason to treat it differently from any other immoveable property belonging to the judgment-debtor.

My answer to the references accordingly is that both sections 310-A and 311 of the Code of Civil Procedure apply to sales in pursuance of mortgage decrees.

In Appeal against Order No. 156 of 1900.—With regard to the question raised in this reference, namely, whether an appeal lies against an order refusing to make an order absolute upon an application made under section 89 of the Transfer of Property Act, I think that it lies as from an order passed in execution and not as from a final decree. I entirely agree with the conclusion arrived at by my learned colleague, Mr. Justice Bhashyam Ayyangar, especially as it elaborates and confirms the view I took of the matter so far back as 1893 in the case of *Ramasami v. Sami*(1). The late Chief Justice, Sir Arthur Collins, and myself there held that a decree passed under section 92 of the Transfer of Property

(1) 1 L.R., 17 Mad., 26.

Act is a final decree and that orders passed under section 93 were merely supplementary to the decree made under section 92, showing whether the terms of the decree have or have not been fulfilled, in other words, orders for executing the decree in such respects as it has to be executed. For instance, the decree directs if the mortgagor has paid the money mentioned in the decree to the mortgagee, that the mortgagor shall, if necessary, be put into possession of the mortgaged property. The further order of the Court directing that the mortgagor be put in possession as he has paid the money, is clearly nothing but execution of the decree. It cannot be said to be a confirmation of the decree which it is merely carrying out. So, in the same way, when the mortgagor has failed to pay the amount mentioned in the decree, it is further decreed that the property be sold, and the subsequent order that the property be sold as the money has not been paid must also be held to be an order in execution and not merely a confirmation of the decree. To hold otherwise would be to hold that one part of the decree is final and that another part is not. There cannot be two final decrees on the same matter in any suit. So that, if the decree under section 92 is a final decree in respect to the delivery of possession of the property to the mortgagor in case he pays, it is also final in respect to the sale of the property in case he does not pay. No doubt the decree is a conditional decree, but the ascertaining which of its conditions has been fulfilled and the passing of orders consequent thereon cannot but be matters relating to its execution. It has been the practice of this Court to treat an application in execution for an order for sale in pursuance of a mortgage decree as tantamount to an application to make an order absolute for sale although these terms are not used. This could never have been permitted if it had been deemed necessary that before making an application for an order for sale in execution, a prior application for making the decree for sale absolute by an order had to be applied for and granted. So that the practice of this Court has been in accordance with the principle that a decree for sale is a final decree and the order for sale, whether it be called absolute or not, is obtainable only in execution of that final decree.

BENSON, J.—In Appeal against Appellate Order No. 35 of 1901 and Appeal against Order No. 48 of 1900.—I am of opinion that sections 310-A and 311 of the Civil Procedure Code do apply

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to sales of mortgaged property by order of the Court. There can, I think, be no doubt but that such sales may properly be said to be 'under,' *i.e.*, conducted under the authority and in accordance with the provisions of chapter XIX of the Civil Procedure Code. Before the Transfer of Property Act was passed such sales could only have been conducted in any part of India 'under' the Civil Procedure Code and even since the Transfer of Property Act was passed such sales can, in those provinces to which the Transfer of Property Act has not been extended, be conducted only under the Civil Procedure Code. In those provinces to which the former Act has been extended, I think it may properly be said that such sales are 'under' both Acts, that is to say, they are held under the authority of, and are conducted in accordance with, the provisions of the Civil Procedure Code generally, and such special provisions, if any, as are to be found in the Transfer of Property Act. Both Acts must be read together and effect must be given to the provisions of both unless they are found to be inconsistent.

In this view the right given by section 311, Civil Procedure Code, to apply to the Court to set aside a sale on the ground of material irregularity, must obviously apply to sales of mortgaged property by order of the Court, for there is nothing in the Transfer of Property Act inconsistent with that section. I think that section 310-A also applies to such sales and for the same reason, *viz.*, that there is nothing in it inconsistent with the Transfer of Property Act.

When the Civil Procedure Code and the Transfer of Property Act were passed in 1882 there was no provision of law corresponding to that now contained in section 310-A, whereby the Court could set aside a sale after it had taken place, on the judgment-debtor paying up the decree-debt and compensating the purchaser for his disappointment. The law was then in this respect just the same in regard to sales of mortgaged property and sales of other property attached and sold by the Court in execution of a decree. The Court had power, in its discretion, to adjourn the sale, but once the sale had taken place the judgment-debtor could not get it set aside by any payments to the decree-holder and purchaser. The Transfer of Property Act in sections 87 and 93 provided for working out decrees for foreclosure and redemption, respectively, and in both cases gave the Court power to postpone from time to time the day named in the decree for payment.

This power of postponement before making an order absolute for foreclosure was necessary in order to prevent hardship in certain cases. It was not given by the Civil Procedure Code, so it was necessary to provide for it in the Transfer of Property Act.

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The Civil Procedure Code did, however, provide as already stated for the adjournment, from time to time, of sales of immoveable property generally, and as the Civil Procedure Code applied to sales of mortgaged property as well as to sales of other property, there was no need to make any special provision in section 88 or section 89 of the Transfer of Property Act for the postponement of sales of mortgaged property.

Until an order absolute for foreclosure had been made the Court could, under the Transfer of Property Act, postpone the date fixed in the decree for payment of the mortgage money, and even after an order absolute for sale had been made, the Court could, under the Civil Procedure Code, adjourn the sale. But once an order absolute for foreclosure or for sale had been made the mortgagor had no further right to redeem the property. Section 89 provided that when an order absolute for sale was passed the right to redeem was thereupon extinguished and the security was also extinguished, but (as pointed out by Mr Macpherson, 'Law of Mortgage in British India,' 7th edition, page 697) until the sale was effected the mortgagor had the right as a debtor to discharge the decree-debt and thus obviate the necessity for a sale. In that case the property, being freed from the incumbrance, reverted to the mortgagor in full ownership. This was how the law stood in 1882 in places where the Transfer of Property Act was in force, and it was in this state of the law that Act V of 1894 was passed, whereby section 310-A was introduced into the Civil Procedure Code. The policy of this section is well known to those who have followed the course of Indian legislation in recent years and is succinctly set forth in 'the statements of objects and reasons' with which the Bill was introduced into the Legislative Council. That policy, briefly stated, was to obviate the hardships arising from the fact that immoveable property sold by auction in execution of a decree seldom realized an adequate or even a reasonable price, and it was therefore desirable to give persons whose property was so sold a right to recover it on paying to the decree-holder the sum for which it was brought to sale, and also to the purchaser fair compensation for the cancellation of his purchase. The section

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declares, without reservation, that 'any person whose immoveable property has been sold under this chapter may at any time within thirty days from the date of the sale' have it set aside on payment of the judgment-debt, and of compensation to the purchaser. There is no reservation or exception in the case of persons whose immoveable property has been sold under a decree in a suit on a mortgage. The terms of the section include such sales, and effect should be given to its terms unless they are inconsistent with any special provision of law. I cannot see how they are in any way inconsistent with the provisions of the Transfer of Property Act relating to sales of mortgaged property. The object of such sales is to obtain for the mortgagee the mortgage money due to him. When the property has been sold the Court has done all that can be done to obtain the money from the property mortgaged. The mortgagee has no longer any claim on the property and is not concerned with its further disposal. Everything which the Transfer of Property Act says shall be done in regard to the property has been done, and the Act has no further concern with it. I do not think it is correct to say that the application of section 310-A in effect provides for an extension of the time for redemption. It has nothing to do with the redemption of the mortgage, but provides for the restoration of the property to the original owner on certain terms after his right to redeem the mortgage has been extinguished (section 89, Transfer of Property Act) and the property has been sold in execution of the decree. It is just the same in the case of property attached and sold in execution of decrees other than mortgage decrees. When the property has been sold the judgment-creditor has no longer any concern with the property. In both cases the only person then interested is the purchaser. It is not until this stage is reached that section 310-A comes into operation. In pursuance of the policy which dictated its enactment it says that the owner of the property may even at this stage get back the property, provided he at once, that is, within thirty days, pays down not only a sum sufficient to pay what the decree-holder has realized by the sale, but the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, (which may be much more than the amount actually realized) and also a sum equal to 5 per cent. of the purchase money to be paid to the purchaser as compensation for his disappointment and any loss that he may have

incurred by having his purchase thus set aside. It will be seen that the decree-holder cannot suffer, but may benefit, by action taken under section 310-A. The purchaser is the only person who may suffer, but the Legislature has deliberately imposed this risk on him, and he receives compensation. I think it is impossible to draw any distinction, either in equity or under the terms of the law, between the position of the several persons concerned when the property has been sold under a decree in a mortgage suit or under a decree in any other suit, and, in my judgment, section 310-A applies equally to both classes of debtors. This was the view taken by a Bench of this Court of which I was a member in *Tirumal Rao v. Syed Dastaghiri Miyah*(1), and also by the High Courts of Allahabad (*Raja Ram Singhi v. Chunni Lal*(2)) and Bombay (*Krishnaji v. Mahadev Vinayak*(3)). For the reasons stated I am respectfully unable to accept the contrary view adopted by the High Court of Calcutta (*Kedar Nath Raut v. Kali Churn Ram*(4)).

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In Appeal against Order No. 156 of 1900.—As regards the question raised in Appeal against Order No. 156 of 1900, I have had an opportunity of perusing the judgment of my learned colleague, Sir Bhashyam Ayyangar, J., and I entirely concur in his conclusions, that an application under section 89, Transfer of Property Act, must be treated as, in effect, an application for execution of the decree passed under section 88, that it is governed by article 179 of the Limitation Act and that an order thereon is appealable as an order passed under section 244, Civil Procedure Code. I have nothing to add to his exhaustive argument.

BHASHYAM AYYANGAR, J.—The questions referred to a Full Bench in these three cases are respectively the following:—

(i) Whether section 310-A, Civil Procedure Code, is applicable to a sale of mortgaged property which has taken place in execution of a mortgage decree;

(ii) Whether section 311, Civil Procedure Code, is applicable to such a sale;

(1) I.L.R., 22 Mad., 286.

(2) I.L.R., 19 All., 205.

(3) I.L.R., 25 Bom., 104.

(4) I.L.R., 25 Cal., 708.

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(iii) Does an appeal lie against an order refusing to make an order absolute for sale upon application made under section 89 of the Transfer of Property Act.

I propose to consider these three references in one judgment as they all depend in a great measure upon one and the same question, viz., the relation between chapter XIX of the Code of Civil Procedure on the 'execution of decrees' and chapter IV of the Transfer of Property Act on 'mortgages of immoveable property.'

Dealing with the first two questions together, I am clearly of opinion that the provisions of sections 310-A and 311 of the Civil Procedure Code are applicable to sales of mortgaged property in execution of mortgage decrees even in provinces in which the Transfer of Property Act is in force.

The Transfer of Property Act was passed on the 17th of February 1882 and came into force in this Presidency on the 1st July; the Civil Procedure Code was passed on the 17th March and came into force on the 1st of June 1882, section 310-A being introduced into it by an Amendment Act (V) passed in 1894. Though the Transfer of Property Act does not relate to transfer of property by operation of law or by or in execution of decrees or orders, yet an exception is made in regard to the operation of section 57 and chapter IV of the Act [section 2 (d) of the Transfer of Property Act]. It is equally clear that chapter XIX of the Civil Procedure Code relates not only to the execution of simple decrees for payment of money, but also to mortgage decrees directing sale of immoveable property; and in provinces to which the Transfer of Property Act has not been extended, the enforcement and execution of mortgage decrees is regulated solely by chapter XIX, Civil Procedure Code; sections 223 (c), 295 (c), 320 and 322, Civil Procedure Code, directly refer to decrees directing the sale of immoveable property for the discharge of mortgage debts; and sales in execution of mortgage decrees must be conducted only under the provisions of chapter XIX, Civil Procedure Code, and the rules which it is obligatory on the High Court to make under section 287 of the Civil Procedure Code.

Sections 87, 89 and 93 of the Transfer of Property Act prescribe certain rules for the enforcement of decrees in foreclosure suits, in suits for sale and in suits for redemption, such rules being, in my opinion, supplemental to those prescribed by chapter XIX of the Civil Procedure Code. Speaking generally, I may mention

that with the exception of sections 278 to 284 (relating to claims preferred to or objection made to the attachment of property in execution of a decree) and possibly a few more sections, all the other sections are applicable of their own force to the execution of decrees on mortgages. Section 649, Civil Procedure Code, places this matter beyond all doubt. That section extends the rules contained in chapter XIX to the execution of any judicial process for the sale of property which may be ordered by a Civil Court in any civil proceeding. Such provision is made in view to extend the provisions of chapter XIX which relates only to suits, to sales which may have to be made by a Civil Court in some proceedings other than proceedings in a suit. It is thus obvious that all sales which may have to take place in execution of decrees passed in suits are governed and regulated by chapter XIX, Civil Procedure Code.

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Section 104 of the Transfer of Property Act empowers the High Court—without making it obligatory on the High Court to do so, as in the case of rules contemplated by section 287, Civil Procedure Code—to make rules, consistent with the Act, for ‘carrying out the provisions’ of chapter IV of the Act. No rules have yet been framed in this Presidency under this section—so far, at any rate, as Courts subject to its appellate jurisdiction are concerned. But, in my opinion, the rules contemplated by section 104 cannot affect the question now under consideration, and indeed, so far as the Courts subject to the superintendence of the High Court are concerned, no rule could be framed under that section inconsistent with sections 310-A and 311, Civil Procedure Code, or any other enactment for the time being in force. Section 104 of the Transfer of Property Act must be read subject to section 15 of the Charter Act which provides that the High Court shall have power to make and issue general rules for regulating the practice and proceedings of all Courts which may be subject to its appellate jurisdiction, provided that the rules so made are not inconsistent with the provisions of any law in force, and shall, before they are issued, have received the sanction of the Governor-General in Council or of the Governor in Council of Madras or Bombay as the case may be. If section 104 of the Transfer of Property Act were construed as enlarging the powers thus conferred upon the High Court, so as to make it competent for the High Court to substitute its own rules for those contained in the Civil Procedure Code, or to

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make rules which are inconsistent with the provisions of the Civil Procedure Code, section 104 of the Transfer of Property Act will be *ultra vires* of the Indian Legislature; for under section 22 of the Indian Councils Act (24 & 25 Vict., cap. 67) it is beyond the power of the Governor-General in Council to make any law affecting the provisions of any Act passed in the same session of Parliament, and the Indian High Courts Act (24 & 25 Vict., cap. 104) was passed in the same session as the Indian Councils Act (24 & 25 Vict., cap. 67). Section 9 of the Charter Act, no doubt, subjects all powers and authority for and in relation to the administration of justice, which may be conferred upon the High Courts by Her Majesty's Letters Patent, to the control of the legislative authority of the Governor-General of India in Council. But the power to make rules for regulating the practice and proceedings of the Subordinate Courts is not conferred upon the High Court by Letters Patent, but by section 15 of the Charter Act itself, and such power therefore can in no way be affected by the Indian Legislature. On this point I may refer to the decision of the Calcutta High Court in *Queen v. Meares* (1) and in particular to the following extract therefrom (at page 112)—“After consideration of this question, I think that the meaning of the words, ‘any provisions of any Act passed in the present session of Parliament or hereafter to be passed,’ is provisions in the Act itself. For instance, there is the qualification of the Judges of the High Court. The Governor-General in Council has not power to make an alteration in that. There is an express provision of the Act upon the subject. So also in section 15 there is a provision giving to the High Court superintendence over the Courts which are subject to its appellate jurisdiction. That again is a provision in the Act which cannot be affected or altered by the Governor-General in Council. But I am of opinion that the words ‘provisions in the Act’ do not apply to what is not in the Act itself, but only in the Letters Patent which the Act authorises to be issued, and which can only be said to be a ‘provision of the Act’ by relation—by what is rather a forced construction, namely, that as the section says that the Courts shall have all the jurisdiction which shall be given by the Letters Patent, whatever is given by them becomes fixed, and is in the same state as if the words in the

(1) 14 B.L.R., 106 at p. 112.

Letters Patent had been in the Act itself. I think that was not the intention of the Legislature and what has occurred subsequently confirms me in that opinion." Section 15 of the Charter Act also empowers each of the High Courts to prescribe forms for every proceedings in the Subordinate Courts for which it shall think necessary that a form be provided; and the proviso that they shall not be inconsistent with the provisions of any law in force is equally applicable to them. But section 644, Civil Procedure Code, subjects the forms set forth in the fourth schedule thereto to the power conferred on the High Court by section 15 of the Charter Act

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Section 104 of the Transfer of Property Act does not, in my opinion, primarily contemplate the making of rules for the execution of decrees passed under chapter IV of the Act, such rules being already provided for by chapter XIX of the Civil Procedure Code, supplemented as they are by sections 87, 89 and 93 of the Transfer of Property Act. What the section contemplates is the making of rules for 'carrying out the provisions' in the chapter. Section 85 provides that all persons having an interest in the property comprised in the mortgage must be joined as parties to any suit relating to such mortgage. But the sections relating to foreclosure, sale and redemption do not provide for successive redemptions and foreclosures and for the adjudication and enforcement of the rights of puisne mortgagees and of other persons having an interest in the property comprised in the mortgage who are joined as parties to the suit. No inconsiderable number of mortgages on which suits are brought are really 'anomalous mortgages' and adequate provision is not made in the chapter for dealing with such suits and for working out the rights and liabilities flowing therefrom. The rule-making power conferred on the High Court by section 104 is, in my opinion, principally intended to regulate the procedure to be adopted for carrying out these and similar provisions contained in the chapter. The wording of section 104, however, is sufficiently wide to authorize also the making of rules for more effectually enforcing decrees that may be passed under the chapter; but such rules may supplement the provisions of chapter XIX, Civil Procedure Code, provided they are not inconsistent with them, but cannot supersede them.

With all deference I am unable to concur in the Full Bench decision of the Calcutta High Court in *Kedar Nath Rao v. Kali*

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Churn Ram(1) in which it was held that section 310-A, Civil Procedure Code, was not applicable to a sale of mortgaged property in execution of a decree ordering sale thereof. In that decision the learned Chief Justice goes so far as even to doubt whether a rule under section 104 of the Transfer of Property Act extending section 310-A, Civil Procedure Code, to such a sale would not be invalid as being inconsistent with the Transfer of Property Act. The whole reasoning proceeds upon the assumption that section 104 would not have been introduced into the Act, if the provisions of the Civil Procedure Code for the execution of decrees were applicable to sales of mortgaged property in execution of decrees passed under the Transfer of Property Act. The High Court of Calcutta appears to have framed rules simply extending specified sections of chapter XIX, Civil Procedure Code, to sales of mortgaged property. At the time when such rules were framed, section 310-A had not been enacted. If it had been provided by section 104 of the Transfer of Property Act, that it would be competent for a High Court to extend all or any of the sections of chapter XIX of the Civil Procedure Code to sales of mortgaged property, that might, by implication, amount to a legislative declaration that chapter XIX in itself was not applicable to such sales. But that is not how section 104 is framed. What the High Court of Calcutta has done is not to make rules but to extend specified sections of the Code of Civil Procedure to them. The argument that the application of section 310-A, Civil Procedure Code, to the setting aside of a sale of mortgaged property is really to extend the time for redemption and thus to violate the provisions of the Transfer of Property Act is far from conclusive. When an order for sale is passed under section 89 of the Transfer of Property Act,—and a sale could take place only after such order—the right of redemption and the security are both extinguished, and the property is sold unincumbered by the mortgage, like any other property of the judgment-debtor which has not been mortgaged as security for the decree debt. The judgment-debtor, therefore, by being allowed the statutory benefit of section 310-A is not allowed to redeem the property from the mortgage, but, as in the case of a sale of any of his other properties not comprised in the mortgage, to rescind the sale and that only

(1) I L R., 25 Cal., 703.

on condition of paying compensation for such rescission to the auction purchaser, viz., 5 per cent. of the purchase money.

The application of section 310-A to such a sale—ordered under chapter IV of the Transfer of Property Act but conducted and carried out under chapter XIX, Civil Procedure Code—can no more be regarded as extending the time for redemption of a mortgage than the application of section 291, Civil Procedure Code, under which any sale ordered under section 89 of the Transfer of Property Act may be adjourned from time to time and in fact stopped, if before the lot is knocked down the mortgage debt and costs are paid into Court. The question as to whether sections 310-A, 291 or other similar sections in the Code of Civil Procedure are, or are not, consistent with the provisions of the Transfer of Property Act will be material only if it is proposed to make rules under section 104 of the Transfer of Property Act embodying the provisions of those sections of the Civil Procedure Code on the assumption that those sections in themselves are, by virtue of section 104 of the Transfer of Property Act, rendered inapplicable to sales in execution of mortgage decrees passed under chapter IV of the Transfer of Property Act. But in the view that those sections are in themselves applicable to such sales and that section 104 of the Transfer of Property Act does not render them inapplicable, the question as to their being consistent or otherwise with the provisions of the Transfer of Property Act is immaterial. If in any particular there be a real inconsistency between the provisions of the Transfer of Property Act—which was passed on the 17th February and came into force on the 1st July 1882—and of the Civil Procedure Code—which was passed later on the 17th March, but came into force earlier on the 1st June 1882—it may admit of some doubt as to which should prevail. That, in passing the Transfer of Property Act, it was the policy of the Legislature that the Act is not to operate as repealing by implication the provisions of any enactment, is expressly declared in section 2 (a), and so far as section 310-A is concerned—which was enacted only in 1894—there can be no manner of doubt that that must take effect even if it be inconsistent with the provisions of the Transfer of Property Act.

The reasoning on which the above Full Bench decision of the Calcutta High Court is based, if not its authority, is very much

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shaken by the decision of a Division Bench of the same Court in *Dakshina Mohan Roy v. Srimati Basumati Debi*(1).

It has been held by this Court as well as by the High Courts of Bombay and Allahabad that section 310-A is applicable to sales of mortgaged property in execution of mortgage decrees (*Tirumal Rao v. Syed Dastaghiri Myah*(2); *Krishnaji v. Mahadev Vinayak*(3); and *Raja Ram Singhji v. Chhanni Lal*(4). Several decisions (*Burj Mohun Thakoor v. Rai Uma Nath Chowdhry*(5) and *Mahomed Meera Ravuthar v. Savvasi Vijaya Raghunadha Gopalar*(6)) have proceeded upon the assumption that section 311 is applicable as well to sales of mortgaged property as to sales in execution of simple money decrees. I see no reason whatever to depart from these decisions and to adopt the view taken by the Full Bench of the Calcutta High Court.

As regards the reference made in Appeal against Order No. 156 of 1900, I am clearly of opinion that an appeal does lie from an order refusing to make an order absolute in pursuance of a decree for sale passed under section 98 of the Transfer of Property Act. A decree passed under section 88 of the Transfer of Property Act, either under paragraph 1 or paragraph 2 thereof, fulfils in every respect the first part of the definition of 'decree' as given in the Civil Procedure Code, viz., 'decree means the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court, when such adjudication, so far as regards the Court expressing it, decides the suit or appeal'. This corresponds to what—unless there is something to show an intention to use the words in a more extended sense—in law is regarded, in its strict and proper meaning, as a 'final judgment,' that is, 'a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established, (per Cotton, L.J., in *Ex parte Chmery*(7)). In the same case Bowen, L.J., in expressing his concurrence with Cotton, L.J., observed as follows:—"I think that a garnishee order absolute is not a 'final judgment.' There is an inherent distinction between 'orders' and 'judgments. It is true that certain acts of Parliament have given to 'orders' the effect of 'judgments,'

(1) 4 Calc. W.N., p. 474, at pp. 479-480.

(3) I.L.R., 25 Bom., 104.

(5) L.R., 19 I.A., 154; I.L.R., 20 Calc., 8.

(6) L.R., 27 I.A., 17; I.L.R., 23 Mad., 227.

(2) I.L.R., 22 Mad., 286.

(4) I.L.R., 19 All., 205.

(7) L.R., 12 Q.B.D., 342 at p. 345.

but the distinction between them remains. The words 'final judgment' having, then, a proper professional meaning, when they are found in a section of an Act of Parliament defining acts of bankruptcy, they should be as strictly construed as if they occurred in a section which was defining a misdemeanour, because the commission of an act of bankruptcy entails disabilities on the person who commits it" (vide also *Smith v. Dares*(1)).

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The Civil Procedure Code contemplates but one 'decree' in a suit, in the above sense, and it nowhere contemplates the passing of a 'preliminary decree' as distinguished from a 'final decree' or of a 'decree nisi' as distinguished from a 'decree absolute' (vide sections 213, 215, 215-A, 265 and 396). Sections 213, 215 and 215-A empower the Court, 'before making its decree' in the classes of suits therein referred to, to order that accounts be taken. In the case of a suit for the partition of an estate paying revenue to Government, the Court passes but one decree and that is a decree directing the partition. It is then transferred to the Collector for making the partition according to the law, if any, regulating such partition (section 265). No further decree is passed by the Court. In the case of a suit for partition of immoveable property not paying revenue to Government there is to be also but one decree; but, before making that decree, the Court may appoint a commissioner to submit a scheme for effecting the partition (section 396). There is, in the section, no reference made to a 'preliminary decree'. All that the section enjoins is that the Court 'after ascertaining the several parties interested in' the property, of which a partition is sought 'and their several rights therein, may issue a commission,' &c

The second part of the definition of 'decree' in the Civil Procedure Code enlarges the first part of the definition by including therein 'an order rejecting a plaint, or directing accounts to be taken, or determining any question mentioned or referred to in section 244, but not specified in section 588.' But for this enlargement of the definition of 'decree' the right of first and second appeals would, under sections 540 and 584, Civil Procedure Code, be restricted only to 'final adjudication' of a suit corresponding to a 'final judgment' in its strict and proper sense as explained in *Ex parte Chinnery*(2) already quoted. The effect of

(1) L.R., 31 Ch.D., 595

(2) L.R., 12 Q.B.D., 342 at p. 345.

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the enlargement is to extend such right of first and second appeals to 'orders directing accounts to be taken' prior to final adjudication and to all orders subsequent to adjudication, which orders are passed under section 244, Civil Procedure Code, to give effect to or carry out the adjudication. An order rejecting a plaint is also thus made subject to a first and second appeal.

The scheme of the Civil Procedure Code is clear, namely, that there is to be only one decree in the suit, corresponding to the first part of the definition, and that all 'orders' subsequent thereto, relating to the execution of such decree, determining any question mentioned or referred to in section 214 are also to be treated as 'decrees' for purposes of appeal, as also orders rejecting a plaint or directing accounts to be taken in the course of a suit. The adjudication of the suit in the sense of 'final judgment' therein is reached when the 'decree' according to the first part of the definition is passed: but the suit terminates only when such 'decree' is fully effectuated and all proceedings in execution thereof are 'proceedings in suits' (vide explanation to section 647, Civil Procedure Code) and until the final judgment (decree) is satisfied the cause is still pending (*Salt v. Cooper*(1)) and the action is not dead (*Collinson v. Jeffery*(2)).

As regards Form No. 129 in the fourth schedule to the Civil Procedure Code, which is headed 'final decree for foreclosure' and which by section 87 of the Transfer of Property Act was amended by substituting 'decree absolute' for 'final decree,' I may mention that in the body of the form reference is made to 'the order made in this suit on the day of last and the period of six months has elapsed since the said day of last.' It will thus be seen that the form is not technically accurate; what is referred to as 'order' in the body of the form is technically and in reality a 'decree' passed under and referred to as such in section 86 of the Transfer of Property Act. I may add that, according to the English law and practice, the heading of the form ought to be 'order absolute for foreclosure' and not 'final decree for foreclosure.' I fully concur in the following criticism of this amendment by Macpherson in his 'Law of Mortgage in India' [7th edition, page 695, note (4)]—"The amendment of the heading of Form No. 129 of schedule IV of the Civil

(1) L.R., 16 Ch.D., 544 at p. 551.

(2) [1896] 1 Ch., 644 at p. 646.

Procedure Code made by this paragraph seems hardly correct. This Act nowhere refers to a 'decree absolute,' though the second paragraph of this section provides for the passing by the Court of an order that the defendant be debarred absolutely of all right to redeem the property. If any amendment of the heading of the form appended to the Code was necessary, it should. it is submitted, have substituted the words 'order absolute' for 'decree final.' In England also it may be observed, a foreclosure is made 'final,' i.e., absolute, by an order, not by a decree (Seton on 'Decrees,' 4th edition, page 1089) " Dr. Ghose in his Tagore Law Lectures on the 'Law of Mortgages in India' (3rd edition at page 893) in noticing this amendment of the heading of Form No 129, Civil Procedure Code, observes:—" It may be noticed that the amendment in the last paragraph (of section 87) is not very felicitous. The term 'decree absolute' should strictly be 'order absolute'; as foreclosure is made final by an 'order' and not by a 'decree.' "

Forms, and much less the headings of forms, cannot control the construction of the Act and an amendment of the heading of a form by an Act will really carry no greater weight. This amendment is all the more surprising as in the earlier editions of the Bill which was finally passed into the Transfer of Property Act, the alteration proposed was to substitute 'order absolute' for the words 'final decree' I may add that in the body of the form the word 'decree' should have been substituted for 'order'

That, in respect of decrees to be passed in mortgage suits under the Transfer of Property Act, the Legislature did not wish to depart from the scheme of the Civil Procedure Code is made abundantly clear by the circumstance that, though in the first edition of the Transfer of Property Bill, section 19 provided for the passing, in a foreclosure suit, of a 'preliminary decree' corresponding to the 'decree for foreclosure' in section 86 of the Act and thereafter of a 'decree for the foreclosure of the mortgage' corresponding to the 'order absolute for foreclosure' in section 87 of the Act, yet in the subsequent editions of the Bill 'decree' was substituted for 'preliminary decree' and 'order absolute for foreclosure' for 'decree for foreclosure.' And thus sections 86 and 87 of the Transfer of Property Act, as they now stand, are in accordance both with the scheme of the Civil Procedure Code and with the English Chancery law and practice. Similarly in regard to suits for redemption, section 25 of the first edition of the Bill

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provided for the passing of a 'preliminary decree' corresponding to section 92 of the Act, and, in accordance with the English Chancery law and practice, 'for the suit standing dismissed and the plaintiff being foreclosed of all right to redeem' (corresponding to section 93 of the Act) in default of payment, within the time fixed, of the amount found due. In the subsequent editions of the Bill the provision for the dismissal of the suit in default of payment within the time fixed was dropped that for the passing of an order absolutely debarring the plaintiff of all right to redeem being alone retained. So far as section 88 is concerned, in which the decree is for sale of the property mortgaged, whether the same be passed in a suit for sale, or in lieu of foreclosure in a suit for foreclosure, the matter is free from any difficulty, and whatever doubt there may possibly be as to the nature and scope of an order absolute for foreclosure under sections 87 and 93, none such exists in regard to an order absolute for sale under section 89, which is the matter immediately under reference. Form No. 128 (fourth schedule, Civil Procedure Code) is the form of a decree for sale as prescribed by section 88 of the Transfer of Property Act, and there is no form given for an 'order absolute for sale' corresponding to the so-called 'decree absolute for foreclosure' (Form No. 129). The English form corresponding to Form No. 128, Civil Procedure Code, is Form No. 12 (Sale in Default of Payment) in Seton on 'Judgments and Orders' (5th edition) on page 1587. In Seton, as in the Civil Procedure Code, there is no distinct form for an 'order absolute' for sale. In the form in Seton, liberty is reserved to apply at Chambers, for directions to effect the sale (vide Annual Practice for 1902, volume I, page 764, order 55, rule 2, clause 14).

Under the Transfer of Property Act, an order for sale is obtained under section 89, in default of payment by the mortgagor of the decree amount within the time specified in the decree; on the passing of such order, the security as well as the mortgagor's right to redeem are both extinguished and the sale is conducted under the provisions of the Civil Procedure Code as in the case of a simple money decree, in execution of which the property ordered to be sold had been attached, and the 'security' of the decreeholder as mortgagee of the property is preserved by the decree by giving him against the sale-proceeds, 'the same right as he had

against the property sold. Mr. Macpherson, in commenting upon the effect of the mortgagor's right to redeem as well as the security being extinguished by the passing of an order absolute for sale, explains it as follows, and I fully concur in the same—(Macpherson—'Law of Mortgage in British India'—7th edition, pages 697-98)—“As on the passing of an order absolute for sale, the defendant's right to redeem and the security are extinguished, it is clear that the defendant cannot redeem the mortgage after the passing of such an order. And if the effect of this were that the defendant could not pay off the amount due after an order for sale had been passed, this provision would be most inequitable, for it would amount to this, that a mortgagor who was willing to pay the amount of his debt would be absolutely prohibited from doing so and that a Court would be compelled to sell a property in order that a mortgagee might receive payment of that which the mortgagor was before, and at the time of the sale, perfectly ready and willing to pay him. It is submitted, however, that, though the effect of the provision no doubt is to extinguish the mortgagor's right to redeem, he still has the same right as any other judgment-debtor has, to pay off the amount of his debt at any time before actual execution, that is, before the property is sold. In other words, though he may not, after the passing of an order absolute for sale, pay the money as a mortgagor, he may do so as a judgment-debtor. There seems to be nothing in this view which is inconsistent with the section, and, as it favours equity it is one which, it is submitted, may well be adopted. Further, as on the passing of an order absolute for sale, the security is extinguished, the mortgagee's interest in the property must then also come to an end. The effect of this must, it is submitted, be that the entire ownership of the property reverts to the mortgagor, for after the mortgagee's interest in the property is extinguished there is nothing to limit the full ownership which is vested in the mortgagor. In the event, therefore, of the mortgagor paying off his debt after such an order as above suggested, no retransfer of the property by the judgment-creditor to the judgment-debtor would appear to be necessary, inasmuch as the full ownership of the property reverted to the judgment-debtor when the order absolute for sale was made.”

The absence of a provision in section 89 corresponding to the proviso to sections 87 and 93, empowering the Court to postpone

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from time to time the day fixed in the decree for payment of the mortgage money, is because the mortgagor under the provisions of the Civil Procedure Code is given liberty to arrest the sale by payment before the lot is knocked down, and there is no need for a reconveyance by the mortgagee, inasmuch as, on the passing of an order absolute for sale under section 89, the mortgage security was extinguished and the ownership reverted to the mortgagor by operation of law. Though the absence of a proviso to section 89, empowering the Court to postpone the day appointed in the decree for payment of the amount will not really prejudice the mortgagor—the judgment-debtor—if the mortgagee should obtain an order absolute for sale, yet if the mortgagee, as he might in some cases, does not choose to do so, the mortgagor will be unable, so far as any rate as the Transfer of Property Act goes, to obtain reconveyance of the property by exercising his right of redemption on payment after the day appointed. It would, therefore, have been better if the proviso for postponing such day, which finds a place in sections 87 and 93, had also been added to section 89.

If the decree for sale passed under section 88 of the Transfer of Property Act has only to be executed under the provisions of chapter XIX of Civil Procedure Code, section 89 of the Transfer of Property Act, might at first sight seem superfluous. Without saying that section 89 is absolutely necessary in the sense that, but for it, decrees passed under section 88 could not be executed—for mortgage decrees passed prior to the Transfer of Property Act were being executed under the provisions of the Civil Procedure Code—section 89 serves two purposes. Under the Civil Procedure Code it is only property that had been attached that could be ordered by the Court to be sold (vide section 284). Hence it was that, prior to the passing of the Transfer of Property Act, and in this Presidency even for some years after it, mortgage decrees used to be executed by first attaching the mortgaged property referred to in the decree and then obtaining under section 284, Civil Procedure Code, an order for sale, the result of which was that claims to the mortgaged property preferred by strangers used to be entertained and summarily adjudicated upon under the claim-sections of the Civil Procedure Code. This defect in the Civil Procedure Code, by reason of which a difficulty might be raised that an order for sale of the mortgaged property which had not been attached could not be obtained under its provisions, was

remedied by section 89 of the Transfer of Property Act. Another important purpose served by section 89 is to extinguish the security and the correlative right of redemption, so that the decree may be executed as a money decree in respect of the mortgaged property ordered to be sold, and the property be sold as if the mortgagor—the judgment-debtor—were the owner thereof, unincumbered by the mortgage in question, thus obviating the necessity for extension of the time fixed for payment under section 88 as in the case of decrees for foreclosure or redemption.

In my view, section 89 operates as a provision supplemental to chapter XIX of the Civil Procedure Code, so that a mortgage decree passed under section 88 of the Transfer of Property Act may be executed on a scientific basis, and the application to the Court for an order absolute for sale is nothing but an application under section 235, Civil Procedure Code, to work out in execution proceedings (*Sri Rajah Papamma Rao Bahadur v. Sri Vira Pratapa Korkonada*(1), *Maharajah of Bharatpur v. Ram Kanno Dei*(2), *Harendra Lal Roy Chowdhry v. Maharanı Dasi*(3)), the decree passed under section 88 of the Transfer of Property Act. In all these three cases the Judicial Committee of the Privy Council refer to the enforcement of the conditional directions contained in the decree passed under section 88 of the Transfer of Property Act as 'execution' of the same, and in the last of them, the order absolute passed by the original Court under section 89 is referred to by the Judicial Committee as the granting of 'execution of the decree to the full amount.' Section 89 is silent as to the contents of the application, whether it should be verified or not, and notice thereof given or not to the judgment-debtor, because these matters are fully provided for by sections 235 and 248, Civil Procedure Code. A reference to the particulars given by section 235 will show that an application for an order absolute for sale under section 89 of the Transfer of Property Act must contain all such particulars. Particular 'j' after specifying certain reliefs which may be applied for, concludes 'or otherwise as the nature of the relief sought may require.' In the case of a mortgage decree as such under section 88 none of the reliefs specifically mentioned in 'j' can be applied for, and the 'other' relief to be applied for will be an order

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(1) L.R., 23 I.A., 32 at p. 35, I.L.R., 19 Mad., 249 at p. 253.

(2) L.R., 28 I.A., 35, I.L.R., 23 All., 181

(3) L.R., 28 I.A., 89, I.L.R., 28 Calc., 557 at p. 565.

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absolute for sale of the mortgaged property. Whether or not notice of this application is to be given to the judgment-debtor or his legal representative will depend on the provisions of section 248, Civil Procedure Code (*Tarapada Ghose v. Kamini Dassi*(1)). The order of the Court under section 89 should be to sell either the whole of the mortgaged property, or only a sufficient portion thereof specifying such portion in the order. Under section 286 the sale will have to be conducted by an officer of the Court and made by public auction. As soon as the order for sale is passed, the duty devolves upon the Court to issue and publish a proclamation of the intended sale under section 287, Civil Procedure Code, and the sale will have to be conducted and completed in the manner provided by the subsequent sections, a warrant of sale being issued to an officer of the Court in the form prescribed by Form No. 145 of the fourth schedule to the Civil Procedure Code.

That an application under section 89 of the Transfer of Property Act for an order absolute for sale is only an application for 'leave to issue execution', is also in conformity with the execution chapter containing the rules framed under the Judicature Act under Order No. 42. Rule 9 runs as follows:—"Where a judgment or order is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of such condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the Court or a Judge for leave to issue execution against such party. And the Court or Judge may, if satisfied that the right to relief has arisen according to the terms of the judgment or order, order that execution issue accordingly, or may direct that any issue or question necessary for the determination of the rights of the parties be tried in any of the ways in which questions arising in an action may be tried." (Annual Practice, 1902, volume I, page 571.) The judgment or decree passed under section 88 of the Transfer of Property Act, in so far as it orders sale of the mortgaged property in default of payment within the time fixed in the decree, is a judgment subject to a condition or contingency as defined in the above rule, and an application to enforce the judgment (vide section 230, Civil Procedure Code) by ordering the sale of the mortgaged property

(1) 6 Calc. W.N., Appx. xxvii.

on the ground that the condition or contingency has happened is nothing but an application for leave to issue execution against the mortgagor—the judgment-debtor—as provided in the above rule, and the applicant affords proof that the condition or contingency has happened, entitling him absolutely to an order for sale, by verifying his petition which is presented under sections 89 of the Transfer of Property Act, and 235, Civil Procedure Code.

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Under section 223, Civil Procedure Code, a decree passed under section 88 of the Transfer of Property Act may be sent for execution, under the provisions therein contained, to some other Court and, in my opinion, it may be so sent either before or after the order for sale is passed under section 89. In the latter case, such order should, under section 224 (c), Civil Procedure Code, accompany a copy of the decree sent for execution; in the former case the Court to which the decree is sent for execution has, under section 228, the same powers in executing such decree as if it had been passed by itself and its orders in executing such decree are subject to the same rules in respect of appeals as if the decree had been passed by itself. If the Court, to which a decree passed under section 88 of the Transfer of Property Act is sent for execution, is by fiction of law to be deemed the Court which passed the decree itself, the order for sale under section 89 can of course be passed by that Court itself and need not be passed by the Court which in fact passed the decree, either as a Court of First Instance or as an Appellate Court.

That section 89 of the Transfer of Property Act does not contemplate the passing of a 'decree absolute' by making absolute the decree which was passed only conditionally under section 88, is placed beyond all doubt by the fact that the conditional decree in favour of the defendant—the mortgagor—against the plaintiff—the mortgagee—is not required to be made absolute by an application to be made by the defendant—the mortgagor—under section 89. In every decree passed under section 88, the defendant on payment, on or before the date fixed in the decree, of the amount found due and declared, is entitled to a recovery from the plaintiff of all documents relating to the mortgaged property, to a reconveyance of the property and, if necessary, to be put into possession of it. The defendant on fulfilling the condition of payment is of course entitled to the above reliefs by executing the decree, and, if so, why is section 89 of the Transfer of Property Act entirely

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silent about any order absolute, at the instance of the defendant, for all or any of these reliefs? The reason is that the sections of the Civil Procedure Code relating to the enforcement of decrees for delivery of chattels or of immoveable property or for the execution of conveyances are ample in themselves and may be carried out without the aid of a supplemental provision in section 89 of the Transfer of Property Act, as in the case of an order for sale of mortgaged property. I have already suggested the probable reason for this supplemental provision in section 89 of the Transfer of Property Act in regard to an order for sale of mortgaged property. Be this as it may, the scope and object of section 89 is not to convert a 'decree nisi' passed under section 88 into a 'decree absolute,' or a 'preliminary decree' into a 'final decree' If that were the object, it is inconceivable that it would be carried out only so far as the decree nisi or preliminary decree is in favour of the plaintiff and not in so far as it is in favour of the defendant and every decree under section 88 is necessarily of this dual nature The decree passed under section 88 is the only and the final decree in the suit and section 89 is only a supplemental provision for the effectual execution on a scientific basis, of such decree, in so far as it is in favour of the plaintiff, no such supplemental provision being considered necessary for the execution of the decree in so far as it is in favour of the defendant

That the framer of the Transfer of Property Act steadily and distinctly kept in view the difference between a 'decree' and an 'order,' though such order may have the force of a decree, *i.e.*, the difference between 'decree' according to the first part of its definition in the Civil Procedure Code and 'decree' according to the second part of the definition, is significantly brought out by section 90 of the Transfer of Property Act immediately following section 89. That section provides for the Court passing a decree (not an 'order') against the judgment-debtor, for the recovery of the balance of the mortgage debt remaining due after payment to the mortgagee of the net proceeds of the sale of the mortgaged property. Such decree will have to be executed under the provisions of the Civil Procedure Code as a simple decree for money, and the object of the section is to obviate the necessity of the mortgagee having to bring a fresh suit on payment of the institution fees—and that, in most cases, probably in a Court

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different from that which passed the mortgage decree or is executing it—to recover the balance of the debt from the mortgagor, on his covenant to pay. If, in the original suit itself, the mortgagee had included a personal claim against the mortgagor for payment of the mortgage debt and obtained a decree for payment of the debt ‘personally’ [*Dymond v. Croft*(1); *Farrer v. Lacy, Hartland & Co.*(2), per North, J.; *Bissett v. Jones*(3); Fisher on ‘Mortgages,’ 5th edition, paragraphs 806 and 990] and also a decree under section 88 of the Transfer of Property Act for sale of the mortgaged property, there would be no necessity for his applying under section 90 for a fresh decree after the proceeds of the sale of the mortgaged property have proved insufficient to satisfy the debt. But there may be cases in which, with reference to the provisions of sections 16 and 17, Civil Procedure Code, the mortgagee would be unable to include both claims in one and the same suit, by reason of the cause of action not having arisen or the defendant not residing within the territorial jurisdiction of the Court having jurisdiction over the mortgaged property. In such a case, under the ordinary law, he will have to bring a separate suit in the Court within whose jurisdiction the cause of action on the covenant to pay has arisen or the mortgagor is residing, for enforcing his claim against the mortgagor personally, and that only if, under section 43, Civil Procedure Code, he obtained the leave of the Court in which the first suit was instituted, to reserve his personal remedy against the mortgagor. Section 90 of the Transfer of Property Act substitutes an application for a separate suit and thus enables the mortgagee to steer clear of the processual difficulties arising under sections 17 and 43, Civil Procedure Code, and obtain, on application made to the Court executing the mortgage decree, a personal decree for payment of the balance due. Such application should, however, be regarded as an application for execution of the mortgage decree and therefore governed by the law of limitation applicable to the execution of the mortgage decree. But the application would be infructuous under section 90 of the Transfer of Property Act unless the mortgagee’s personal remedy against the mortgagor is also not barred by the general law of limitation. The decree under

(1) L.R., 3 Ch.D., 512 at p 516. (2) L.R., 25 Ch.D., 636 at pp. 643, 644, 645,
(3) L.R., 32 Ch.D., 635 at p. 637.

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section 90 being virtually a decree in a suit in the form of an application—which application is made in pursuance of a prayer in the plaint [vide Form No. 109, paragraph 3 (c), fourth schedule to the Civil Procedure Code]—its execution will be governed by article 179 of the Indian Limitation Act and the mortgagee will have to make a separate application under section 235, Civil Procedure Code, for execution of this fresh or supplemental decree.

With all deference, I am compelled to dissent from the view taken by the Calcutta High Court in more cases than one (*Ajudhia Pershad v. Baldeo Singh*(1) and *Tara Prosad Roy v. Bhobodeb Roy*(2)) that an application for an order absolute for sale under section 89 of the Transfer of Property Act is not an application for the execution of the decree passed under section 88, that there is no period of limitation prescribed for such application, that the decree passed under section 88 is only a preliminary decree or a decree *nisi*, and that the order passed under section 89 is a final decree or decree absolute. I entirely agree with the decisions of the Bombay and Allahabad High Courts that an application under section 89 is an application for execution of the decree passed under section 88, that it is governed by article 179 of the Limitation Act and that an order thereon is appealable as an order passed under section 244 (c), Civil Procedure Code (*Oudh Behari Lal v. Nageshar Lal*(3); *Chunni Lal v. Harnam Das*(4); *Bhagawan v. Ganu*(5)). In *Bhagawan v. Ganu*(5) Parsons, J. (Acting Chief Justice) forcibly observes as follows—and I fully adopt his observations. Referring to an application made under section 89 of the Transfer of Property Act he observed—“If the Subordinate Judge had avoided technicalities and treated it as what it really is, namely, an application to the Court for an order for the sale of mortgaged property, all his difficulties would have disappeared. There is no particular magic in the word ‘absolute’ and it is not necessary that the application for the order should state the Act or the section thereof under which it is made.”

I do not think it necessary to refer to the arguments addressed by way of analogy on sections 86, 87, 92 and 93 of the Transfer

(1) I.L.R., 21 Calc., 818.

(2) I.L.R., 22 Calc., 931.

(3) I.L.R., 13 All., 278

(4) I.L.R., 20 All., 302.

(5) I.L.R., 23 Bom., 644 at p. 651.

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of Property Act, and to the various decisions that were cited bearing upon decrees and orders passed under those sections. In the view I take of the matter, I regard the provisions made in paragraphs 1, 2 and 3 of section 87 as provisions for enforcing or executing the decree for foreclosure passed under section 86 and the provisions in paragraphs 1, 2, 3, 4 and 6 of section 93 as provisions for enforcing the decree for redemption passed under section 92 of the Transfer of Property Act. But it is unnecessary to elaborate my view in regard to these decisions with reference to the English Chancery practice, and decisions. English and Indian, or express any decided opinion—especially as a reference has recently been made to a Full Bench for a reconsideration of certain decisions of this Court, which were strongly relied upon, in which it has been held that, notwithstanding that a decree for redemption of a mortgage has been passed, yet subsequent suits for redemption of the same mortgage could be maintained, if no order absolute for foreclosure had been passed in the meanwhile. I may, however, mention that I entirely dissent from more than one decision of this Court (*Vallabha Vahya Rajah v. Vedapuratti*(1); *Narayana Reddi v. Papayya*(2); *Elayadath v. Krishna*(3)) in which it is assumed and held that the time fixed for payment in a decree for foreclosure or for redemption cannot be postponed under the proviso to section 87 or 93 of the Act on the application of the mortgagor, unless he makes such application in answer to an application by the mortgagee for an order absolute for foreclosure, which application by the mortgagee can necessarily be made only after the expiration of the time fixed for such payment. The proviso contemplates 'postponement' of such day and I am clearly of opinion that the mortgagor can apply, and should ordinarily apply, for postponement, before the mortgagee applies for an order absolute for foreclosure after the expiration of the time so appointed, though according to decisions both in England and here the time appointed may also be retrospectively postponed and extended even on an application made after the day appointed. Every such order of postponement is *pro tanto* within the meaning of section 244 (c), Civil Procedure Code, an order relating to the stay of execution of the decree (*Hulas Rai v. Pirthi Singh*(4);

(1) I.L.R., 19 Mad., 40.

(2) I.L.R., 22 Mad., 133 at p. 136.

(3) I.L.R., 13 Mad., 267 at p. 268.

(4) I.L.R., 9 All., 502—note.

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Rahima v. Nepal Rai(1)). Until the mortgagee obtains an order absolute for foreclosure the action will be pending, though final judgment has been given, and it will be competent to the Court executing the decree on application made by the mortgagor, for good and sufficient cause, to extend the time for payment, whether such application be made before or after the day appointed for payment. And with all deference I dissent from the view taken by the High Court of Calcutta in more cases than one (*Poresh Nath Mojumdar v. Ramjodu Mojumdar*(2); *Ajudhia Pershad v. Baldeo Singh*(3)) that the mortgagor can, even after the expiration of the time limited for redemption by the decree, redeem the mortgage on payment of the amount, without obtaining an extension of such time, so long as the mortgagee has obtained no order absolute for foreclosure. The question as to whether, in the absence of an order absolute for foreclosure, a fresh suit for redemption could be brought, is altogether a different one, the solution of which depends upon the scope and operation of the principle of *res judicata* and of section 244, Civil Procedure Code. I am unable to see how any party seeking to enforce or execute a decree for redemption can claim to do so without complying with the conditions imposed by the decree, as conditions precedent for redemption. It is to mitigate the hardship that may be caused to the mortgagor by non-payment of the amount on or before the day fixed in the decree, that provision is made by sections 87 and 93 of the Transfer of Property Act, empowering the Court executing the decree to extend the time fixed for payment.

The whole difficulty which has led to numerous conflicting decisions of the various High Courts in working chapter IV of the Transfer of Property Act (vide preface to the 3rd edition of the 'Law of Mortgage in India' by Rash Behary Ghose) is chiefly due to the fact that a number of sections which ought really to find a place in the Civil Procedure Code have been incorporated with the Transfer of Property Act. As in the case of sales and leases, the chapter relating to mortgages in the Transfer of Property Act should simply define the different kinds of mortgages and the rights and liabilities of mortgagors and mortgagees of the different classes. The sections relating to the contents of

(1) I L R, 14 All., 520

(2) I L R., 16 Calc., 246.

(3) I L R., 21 Calc., 818.

decrees, to the manner of providing therein for various remedies of the mortgagor and the mortgagee and to the enforcement of such remedies in execution proceedings, should be entirely eliminated from a Code defining the substantive law as to transfer of property by act of parties, and the words, 'save as provided by section 57 of chapter IV of this Act' in section 2 (d) of the Transfer of Property Act, deleted, and section 104, dropped. These sections (83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96, 97, 99, 102 and 103) should, in my opinion, be simplified and recast, certain defects therein being rectified, and with two or three additional sections providing for successive redemptions and foreclosures inserted in the new Civil Procedure Code under the heading of 'Decrees in foreclosure, sale and redemption suits', partly in chapter XVII relating to 'judgments and decrees' and partly in chapter XIX relating to the 'execution of decrees,' sections 96 and 97 however being incorporated with section 295 of the Civil Procedure Code.

In recasting sections 86, 88 and 92 of the Transfer of Property Act, the direction as to the retransfer or reconveyance of the mortgaged property to the mortgagor by the mortgagee should, in my opinion, be restricted to 'English mortgages' and 'mortgages by conditional sale', the direction in the case of simple and usufructuary mortgages and charges being (as provided by section 60 of the Transfer of Property Act) simply to execute (and, where the mortgage or charge has been effected by a registered instrument, to have registered) an acknowledgment in writing that any right in derogation of the mortgagor's interest, transferred to the mortgagee or created in favour of the charge-holder has been extinguished—a provision which was evidently intended to meet cases other than 'English mortgages,' and 'mortgages by conditional sale', but apparently overlooked in the decretal sections 86, 88 and 92. The direction in the decree as to the delivery, by the mortgagee to the mortgagor, of 'all documents in his possession or power relating to the mortgaged property' without specifying the same in the decree, and providing for the payment of a sum of money in respect of each such document (vide section 208, Civil Procedure Code) or for the 'giving of an indemnity, as an alternative, if delivery cannot be had, is vague and indefinite and leads to complicated and vexatious proceedings in execution. In the case of a simple or usufructuary mortgage

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or a charge, there is nothing to be retransferred or reconveyed after the discharge of the debt, any more than there is in the case of a lease after the termination of the lease. But every mortgage decree now contains as a matter of form a direction for retransfer or reconveyance of the property, by the mortgagee or his assignee to the mortgagor, free from all incumbrances created by the mortgagee, or, in the case of his assignee, by those under whom such assignee claims, and in the vast majority of cases, this direction, which is simply unintelligible and puzzling to the parties concerned,—especially when they are furnished with a translation of the same in the vernacular languages of the district—remains a dead letter.

MOORE, J.—In Appeal against Appellate Order No. 35 of 1901 and Appeal against Order No. 48 of 1900.—There can, as it appears to me, be no reasonable doubt that section 311 of the Civil Procedure Code should be held to apply to sales which have taken place in execution of a mortgage decree. That section contains a broad general rule which must, I consider, be held to apply to all sales of immoveable property held under the order of a Court. It is in no way inconsistent with any of the provisions of the Transfer of Property Act. If it were to be held that this section did not apply to sales held under mortgage decrees, it would follow that even where it was shown that grave irregularities had occurred in connection with the sale which had caused gross injustice, the Court would be powerless to set matters right and redress the injury proved to have been inflicted. This cannot have been the intention of the Legislature.

The question as to whether section 310-A of the Civil Procedure Code applies to sales under mortgage decrees is one of considerable difficulty as is shown by the conflicting views of the several High Courts regarding it, Madras (*Tirumal Rao v. Syed Dastaghiri Miyah* (1)), Bombay (*Krishnaji v. Mahadev Vinayak* (2)) and Allahabad (*Raja Ram Singhji v. Chunni Lal* (3)) answering the question in the affirmative, while Calcutta (*Kedar Nath Raut v. Kali Churn Ram* (4)) gives a negative response. At the conclusion of the arguments addressed to the Full Bench I felt disposed to concur with the Calcutta High Court, mainly on the ground that the provisions of

(1) I.L.R., 22 Mad., 286.

(2) I.L.R., 19 All., 205.

(3) I.L.R., 25 Bom., 104 at p. 105.

(4) I.L.R., 25 Cal., 708.

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section 310-A appeared to me to be inconsistent with section 89 of the Transfer of Property Act. That section provides that, on an application being made to the Court for an order absolute for sale of the mortgaged property, the Court shall pass an order that such property be sold and that the proceeds of the sale be dealt with as provided for in section 88 and that, thereupon, the defendant's right to redeem and the security shall both be extinguished; to allow the person whose property has been sold in accordance with this order to have the sale set aside subsequently, under section 310-A of the Civil Procedure Code, appears to me to be inconsistent with the clear provisions of this section of the Transfer of Property Act. A perusal of the draft of the revised Civil Procedure Code and the statement of objects and reasons with the annexed notes on clauses appended thereto shows that the Government of India in the Legislative Department looks at the matter in the same light. In this draft section 310-A is amended so as to make it apply to sales under mortgage decrees and it is provided that the following words shall be added to section 89 of the Transfer of Property Act "save in so far as is otherwise provided by section 310-A of the Civil Procedure Code." With reference to these alterations it is observed as follows in the notes on clauses—"Though sections 291 and 310-A of the present Code are somewhat inconsistent with section 89 of the Transfer of Property Act, it is considered desirable to enact that they apply to sales in the execution of decrees for the enforcement of mortgages."

On thinking the matter over I am, however, somewhat doubtful as to whether there is really any greater inconsistency between section 310-A of the Civil Procedure Code and section 89, Transfer of Property Act, than there is between sections 291 or 311 of the Civil Procedure Code and the Transfer of Property Act (vide remarks of the Bombay High Court as to this, *Krishnaji v. Mahadev Vinayak*(1)). Sections 88 and 89 of the Transfer of Property Act provide that on the plaintiff (mortgagee) getting a decree for sale in case the defendant (mortgagor) does not pay the amount due within the prescribed time, the plaintiff (mortgagee) can apply to the Court for an order absolute for sale. The Court then passes an order for sale and directs that the proceeds of the sale shall be dealt with as mentioned in section 88 and the section then provides

(1) I.L.R., 25 Bom., 104 at p. 106.

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that 'thereupon' the defendant's (mortgagor's) right to redeem shall be extinguished. 'Thereupon' means I believe 'on the order absolute for sale being passed' and not 'on the sale having been completed.' The sale takes place, the property is purchased by a third party, the sale-proceeds are applied under section 88 and the mortgagee is completely paid off. A few days subsequently the mortgagor, being a person whose immoveable property has been sold, comes in under section 310-A, makes the payments there required and gets the sale set aside and his land restored to him. All this is not, I think, really inconsistent with section 89, Transfer of Property Act. The mortgagor has got back his property but the order absolute under which his right to redeem was extinguished is still in force. The arguments in *Kedar Nath Bant v. Kali Churn Ram*(1) are mainly based on a consideration of the rules framed by that High Court under section 104 of the Transfer of Property Act, but those arguments have little force in Madras as we have framed no rules under that section except for the Original Side of the High Court. I am for these reasons not disposed to disagree with the view taken by my learned colleagues that the provisions of section 310-A of the Civil Procedure Code do apply to sales under section 89 of the Transfer of Property Act.

In Appeal against Order No. 156 of 1900.—The question referred for decision to the Full Bench is, "Does an appeal lie against an order refusing to make an order absolute for sale upon an application made under section 89 of the Transfer of Property Act?" The real point at issue is as to whether an application to make the abovementioned order is an application to the Court to make final the preliminary decree already passed under section 88, or is an application for execution of a final decree already passed and capable of being executed. Whichever view be taken, it is clear that there is an appeal. If the application is one for execution an appeal lies under section 244 of the Civil Procedure Code, while, if it be held that till an application for an order absolute for sale is granted or refused under section 89 there is no decree capable of execution, it follows that such an order, whether under it the prayer is granted or refused, is a decree from which an appeal lies in the ordinary course. The question, however, as

(1) I.L.R., 25 Cal., 703.

to whether an application under section 89 for an order absolute for sale should be looked on as an application for execution of a decree, or as one for such an order as will make a decree, which up till then has been unexecutable, capable of being executed, is one of great importance regarding which the several High Courts have arrived at widely divergent conclusions. The principle underlying the procedure prescribed by law with respect to suits relating to mortgages, partnership and partition, appears to be that a suit remains pending until a final decree is made directing a party to pay a certain sum of money, to deliver possession of particular property, etc. Until such a decree is made there is nothing which the Court can execute, inasmuch as a proceeding in execution is a proceeding to enforce an order requiring a party to perform or abstain from performing a particular act.

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Applying this principle, it appears to me that it must be held that, in a mortgage suit for sale or foreclosure, the first decree which declares the rights of the parties is merely a preliminary or interlocutory decree and is not capable of execution. An application for the passing of an order absolute must accordingly be considered to be an application in a pending suit and is therefore not governed by the provisions of the Civil Procedure Code or of the Limitation Act relating to execution. This is the view which has for years past been consistently taken by the Calcutta High Court. Reference may be made to *Ajulhia Pershad v. Baldeo Singh*(1); *Tiluck Singh v. Parsotein Proshad*(2); *Tara Prosad Roy v. Bhobodeb Roy*(3); and *Alakunnissa Bibee v. Roop Lal Das*(4). It was also the view taken by the Allahabad High Court in *Ranbir Singh v. Drigpal*(5), but that decision has been overruled by the judgment in *Chunni Lal v. Harnam Das*(6), which follows the earlier rulings of that Court (*Ram Lal v. Narain*(7) and *Oudh Behari Lal v. Nageshar Lal*(8)). For the same reason in a redemption suit the mortgagee on the failure of the mortgagor to redeem may apply at any time for an order absolute for sale or foreclosure, and the mortgagor can also at any time before the passing of an order absolute under section 93 of the Transfer of Property Act ask the Court to grant him an extension of time for payment under the last

(1) I.L.R., 21 Calc., 818.

(3) I.L.R., 22 Calc., 931

(5) I.L.R., 16 All., 23.

(7) I.L.R., 12 All., 539.

(2) I.L.R., 22 Calc., 924.

(4) I.L.R., 25 Calc., 133.

(6) I.L.R., 20 All., 302.]

(8) I.L.R., 13 All., 278.

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clause of that section (*Nandram v Babaji*(1)) As observed by Farran, C.J., in the decision there reported "We think that the Court has power to give effect to the proviso to section 93 if the postponement is made at any time before the final decree—the decree absolute—is made . . . The original decree is we think only in the nature of a decree *msi* . . . and the order passed under section 93 is in the nature of a decree absolute". The Full Bench decision (*Vallabha Valhya Rajah v. Vedapurattu*(2)) is in no respect inconsistent with this Bombay ruling. All that was decided there was that the plaintiff (the mortgagor) having made default in payment of the mortgage money within the time fixed by the decree was not entitled to apply for execution. He must, in the first instance, apply to the Court for extension of the time within which payment is to be made. The same principle as to preliminary and final decrees is followed in suits for the recovery of immoveable property and mesne profits. Where the Court passes a decree for possession of immoveable property and directs an enquiry as to mesne profits, in the former respect the decree is final and may be executed; but, as regards the mesne profits, it is interlocutory merely, and the subsequent proceedings are in continuation of the original suit, and, until these proceedings are brought to a close and the amount due has been declared, there is no final decree. If the defendant dies subsequently to the interlocutory decree, by which his liability for mesne profits is declared, his representatives must be added as parties to the suit; otherwise they will not be bound by the final decree. Reference as to this may be made to the decision of their Lordships of the Privy Council (*Maharaja Radha Parshad Singh v. Lal Sahab Rai*(3)) In the case there disposed of it appears that it was decreed in 1856 that the plaintiff was entitled to certain lands and to mesne profits up to the date on which he recovered possession. "That decree," as their Lordships observe, "no doubt found that the defendants in the suit were accountable for mesne profits, and by that finding they were bound; but it did not ascertain the amount of such profits, or determine the important question whether the defendants were liable jointly or severally in respect of their wrongful possession. There was no adjudication upon any of these matters until March 1877, when for the first

(1) 1 L.R., 22 Bom., 771.

(2) 1 L.R., 19 Mad., 40.

(3) L.R., 17 I.A., 150, 1 L.R., 13 All., 53.

time, the appellant (plaintiff) obtained a money decree which was capable of being put into execution " The father of the respondents before the Privy Council was one of the defendants against whom the decree of 1856 was passed, but he died before 1877 and his sons were not brought in as parties prior to March 1877. Under these circumstances, their Lordships held that, as an operative decree, by which the extent and quality of the defendant's liability already declared in general terms were for the first time ascertained, had not been obtained till after the death of the defendant, it could not bind his representatives as they had not been brought in as parties to the suit prior to the passing of the operative decree.

The same principle is followed in administration suits (section 213, Civil Procedure Code) and in suits for the dissolution of partnership (section 215, Civil Procedure Code) and for an account between principal and agent (section 215-A, Civil Procedure Code). In all such cases the Court is bound in the first instance to pass an interlocutory order or preliminary decree declaring the rights of the parties and then to proceed to determine the actual amounts due to them; the suits still remains pending and it is only when these amounts have been ascertained that a final decree can be passed and proceedings in execution can be instituted. As to suits for the dissolution of partnership, reference may be made to the judgment in *Thirukumaresan Chetti v. Subbaraya Chetti*(1), and to Forms Nos 132 and 133 in the fourth schedule attached to the Civil Procedure Code. It will be remarked that Form No. 132 dissolving the partnership is termed an order, and that it is not till the actual sums that have to be paid by the plaintiff to the defendant, or *vice versa*, have been definitely ascertained that a decree, is passed (vide Form No. 133). Similarly, in a suit for partition a decree declaring the rights of the parties and directing partition, although appealable (vide the Full Bench decision in *Dulhin Golab Koer v. Radha Dulari Koer*(2)), is not the final decree in the suit, but is an interlocutory or preliminary decree, and an order made in the proceedings subsequently taken to effect the partition must be treated as an order made in the suit and not as one passed in execution of a decree. As was held by O'Kinealy, Macpherson, Trevelyan and Banerjee, JJ., in the

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(1) I L R., 20 Mad, 313.

(2) I L R., 19 Calo., 463.

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Full Bench judgment in *Jogodishury Debta v. Karlash Chundra Lahury*(1), an order passed in a suit for partition subsequently to the preliminary decree appointing a commission to make the partition is not an order in execution, and such being the case is not appealable under section 244, Civil Procedure Code. It is an interlocutory order pending the suit which has not been finally decided. "I am unable" observes Trevelyan, J, "to see how there can be any execution except of a final order or decree which is capable of being enforced against the person or property of a party bound by it. The subsequent proceedings, after an interlocutory decree, are the natural consequences of that decree, but are not, as far as I can see, within the ordinary acceptance of the term, in execution of it" Where, under section 396 of the Civil Procedure Code, a commissioner is appointed to make partition of immoveable property, the proceedings for the purpose of effecting the partition are proceedings in the suit itself and not proceedings in execution of the decree (*Dwarkanath Misser v. Barinda Nath Misser*(2)) and it is not till the commissioner has actually divided the land by metes and bounds that the final decree in the suit can be passed. The general principle that, it appears to me, is followed consistently in the Civil Procedure Code and in those sections of the Transfer of Property Act which deal with decrees in mortgage suits is that, until the specific sums due to the several parties or the defined item of landed property, etc., to be handed over have been finally and definitively determined, a suit remains pending and the Court is bound to proceed with it and of its own motion or on an oral application by a party to take the necessary steps for its final determination. It of course follows from the view that has now been expressed as to the exact significance of the order passed under section 88 of the Transfer of Property Act that there is no limitation as to the time within which an application for an order absolute under section 89 can be made. As to this, the Calcutta High Court holds that such an application is not governed by any limitation and then adds:—"We do not, however, mean to say that, in dealing with such matters, the Court will not be guided by considerations as to whether any delay on the part of the mortgagee has not been unreasonable so as to bring it within the rules applied in such

(1) I L R, 24 Calc, 725

(2) I L R, 22 Calc, 425.

"cases by Courts of Equity" *Tiluck Singh v. Parsotein Proshad*(1)). It has been urged before us that the procedure thus contemplated is likely to give rise to considerable abuse and that it cannot have been the intention of the Legislature that there should be no limitation as to the period within which applications under section 89 of the Transfer of Property Act can be made. Once, however, it is clearly recognised that everything that is done up to the passing of the order absolute is a proceeding prior to the final decree, there is no danger that there will be undue delay in the passing of such an order. If the supervising Courts insist on Subordinate Courts retaining on their files as pending every suit in which final orders under section 89 have not been passed, the Judges of such Courts may be trusted to see that prompt steps are taken to bring about a final adjudication and relieve their file of the suit. For these reasons I am of opinion that we should reply to the reference made to us to the effect that an order refusing to make an order absolute for sale upon an application under section 89 of the Transfer of Property Act is not an order in execution, and as such appealable under section 244 of the Civil Procedure Code, but that it is a decree from which, as such, an appeal lies.

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(1) I.L.R., 22 Calc., 924.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Arnold White, Chief Justice, Mr. Justice Davies,
Mr. Justice Benson, Mr. Justice Bhashyam Ayyangar and
Mr. Justice Moore.*

1901.
December 18.
1902.
January
16, 17.
February
10, 14.

VEDAPURATTI AND OTHERS (DEFENDANTS NOS. 2, 10 AND 11),
APPELLANTS,

v.

VALLABHA VALIYA RAJA AND OTHERS (PLAINTIFF, AND DEFEND-
ANTS NOS. 1, 3 TO 9, 12 TO 14, 16 TO 34, 36 TO 46 AND LEGAL
REPRESENTATIVES OF DEFENDANTS NOS. 35 AND 39) RESPONDENTS.*

*Transfer of Property Act—Act IV of 1882, s. 92—Decree for redemption—Omission
to execute—Maintainability of subsequent suit on same mortgage—Res judicata—
Civil Procedure Code—Act XIV of 1882, ss. 13, 244.*

Where a suit for redemption has been instituted and a decree for redemption has been passed therein, but not executed, a subsequent suit is not maintainable for the redemption of the same mortgage.

SUIT to redeem a mortgage. The case first came on for hearing before BHASHYAM AYYANGAR and MOORE, JJ., when their Lordships stated the facts of the case sufficiently for the purpose of this report in the following

ORDER OF REFERENCE TO THE FULL BENCH.—“The predecessor in title of the present plaintiff brought a suit against some of the present defendants and others to redeem a mortgage of 1853. He obtained a decree directing that, on payment by him into Court of a certain sum on or before a certain date, the defendants should deliver up to him all documents relating to the mortgaged property and retransfer the said property to him, and that if such payment was not made on or before the date fixed the property should be sold. The plaintiff did not pay within the prescribed date and the defendants did not apply for an order for sale. The plaintiff on making payment after the date fixed was unsuccessful in his attempt to redeem and recover possession and has now filed the present suit to redeem the same mortgage. According to the decisions of this Court in *Sami v. Somasundram*(1), *Periandi v.*

* Second Appeal No. 933 of 1899 against the decree of W. H. Welsh, District Judge of South Malabar, in Appeal Suit No. 517 of 1898, affirming the decree of A. Venkataramana Pai, Subordinate Judge of South Malabar, at Palghat, in Original Suit No. 65 of 1897.

(1) I.L.R., 6 Mad., 119.

Angappa(1), *Karuthasami v. Jaganatha*(2), and *Nainappa Chetti v. Chidambaram Chetti*(3), such a suit would seem to lie. The defendants rely on the decision in *Ramasami v. Sami*(4), which however is in conflict with a dictum of Shephard, J, in *Vallabha Valiya Rajah v. Vedapuratti*(5). In *Gan Savant Bal Savant v. Narayan Dhond Savant*(6), *Maloji v. Sagaji*(7), and *David Hay v. Razi-ud-din*(8), it has been held that such a suit will not lie. As there is, therefore, a conflict of decisions and as the point at issue is one of considerable importance, we refer the following question for decision by a Full Bench:—

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“Whether notwithstanding the institution of a suit and the passing of a decree for redemption a subsequent suit for redemption of the same mortgage can be brought when the decree in the former suit has not been executed?”

The case then came on in due course before the Full Bench constituted as above.

Sundara Ayyar, K. R. Subrahmania Sastri and Anantakrishna Ayyar, for appellants.—The present suit was not maintainable. The mortgage now sought to be redeemed is a kanom or usufructuary mortgage, and there could not be a decree for foreclosure. Sections 92 and 93 of the Transfer of Property Act show that defendant could apply only in the event of payment not being made. The amount was not paid within the time fixed. *Vallabha Valiya Rajah v. Vedapuratti* (5). The same plaintiff now brings this suit for redemption. The suit is *res judicata*. The “res” adjudicated on is the right to redeem, and it is barred under section 13 of the Code or the general law, which applies as much to redemption suits as to all others. The condition of paying money into Court is only one imposed by the Court while adjudicating. *Ramasami v. Sami*(4) is conclusive on the point. In that case the order was for foreclosure, whilst here it is for sale. But by section 93 the effect is the same. The suit having been tried on its merits, no second suit can be instituted on the same cause of action; and this is so even if the relation of mortgagor and mortgagee still subsists, and even if the equity of redemption still remains in the

(1) I.L.R., 7 Mad., 423.

(3) I.L.R., 21 Mad., 18.

(5) I.L.R., 19 Mad., 40 at p. 51.

(7) I.L.R., 13 Bom., 567.

(2) I.L.R., 8 Mad., 478

(4) I.L.R., 17 Mad., 96.

(6) I.L.R., 7 Bom., 467.

(8) I.L.R., 19 All., 202.

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mortgagor. Either question is immaterial; the matter is one of procedure. The right, though it may exist, cannot be enforced—*Parashram Jethmal v. Rakhma*(1) per Telang, J. But for the difficulty which was caused by the decision in *Elayadath v. Krishna*(2) and re-affirmed in *Vallabha Valiya Rajah v. Vedapuratti*(3), extension of time would always be obtained and there would be no hardship. Sections 87, 89 and 93 deal with the extinction of certain rights; section 87 of the debt, 89 of the security, and 93 of the right to redeem. But they do not override the ordinary rules of procedure, the most important of which is that a man may seek the assistance of the Court only once. So it serves no useful purpose to show that the right of redemption continues to exist. *Sami v. Somasundram*(4), *Periandi v. Angappa*(5), and *Karuthasami v. Jaganatha*(6) proceed on a construction of a decree that is immaterial to the question now before the Court. The question whether a second suit would lie was not argued in *Vallabha Valiya Rajah v. Vedapuratti*(3) though it was referred to as a reason why execution should not be granted. In *Sami v. Somasundram*(4) the decree was treated as declaratory; moreover the earlier decree in that case was previous to the Specific Relief Act; and the decision must be taken to be that the right to redeem,—and not the remedy—continues. In *Periandi v. Angappa*(5) the same Judges follow *Sami v. Somasundram*(4). In *Karuthasami v. Jaganatha*(6) the Court throughout considers only whether the right to redeem exists, and not the further question,—whether a suit will lie to enforce that right. Of the two conflicting cases (*Ramunni v. Brahma Dattan*(7) and *Ramasami v. Sami*(8)) it is submitted that the latter is rightly decided. *Marshall v. Shrewsbury*(9) really goes upon the principle of *res judicata*, deciding that a second bill by a mortgagor for redemption will not lie. In *Vallabha Valiya Rajah v. Vedapuratti*(3) Shephard, J., did not really consider whether a second suit will lie but rather acted on the supposition that the previous cases were right. *Nainappa Chetti v. Chidambaram Chetti*(10) was a suit in ejectment, and there was no clause for foreclosure in the decree. In *Hari Rari*

(1) I.L.R., 15 Bom., 299.

(3) I.L.R., 19 Mad., 40.

(5) I.L.R., 7 Mad., 423.

(7) I.L.R., 15 Mad., 366.

(9) L.R., 10 Ch. App., 250.

(2) I.L.R., 13 Mad., 267.

(4) I.L.R., 6 Mad., 119.

(6) I.L.R., 8 Mad., 478.

(8) I.L.R., 17 Mad., 96.

(10) I.L.R., 21 Mad., 18.

Chiplunkar v. Shapurji Hormasji Shet(1) the Court really expresses no opinion, and what is expressed is against the contention that a second suit will lie. In *Gan Savant Bal Savant v. Narayan Dhond Savant*(2) the previous decree contained no clause for foreclosure. It was held that a person who had obtained a decree against another should not be allowed to harass him by a second suit. *Maloji v. Sagaji*(3) decides the same, but may possibly go a little too far. In *Sheikh Golam Hossein v. Mussumat Alla Rukhee Beebee*(4) and *Anrudh Singh v. Sheo Prasad*(5) it was held that a second suit would not lie. In *Muhammad Sami-ud-din Khan v. Mannu Lal*(6) a second suit was allowed as the previous decree was declaratory. This case was disapproved of in *David Hay v. Razi-ud-din*(7). *Roy Dinkur Doyal v. Sheo Golam Singh*(8) proceeds on the same lines as the early Madras cases, the earlier decree being construed as declaratory. From *Siva Pershad Maity v. Nundo Lal Kar Mahapatra*(9) it would seem that the Calcutta High Court now takes the view that the second suit will not lie. In all conditional judgments the first order is the final one and appealable as such, and, if not complied with, the condition is deemed to be waived. [They referred to Daniell's 'Chancery Practice,' 6th edition, page 789; R.S.C. O.42 r. 2; *Ladu Chimaji v. Babaji Khanduji*(10).]

Mr. K. Brown, Sankaran Nayar and Govindan Nambiar, for respondent No. 1.—This is a suit for redemption and it is submitted that the right to redeem subsists until it is extinguished, either by the act of the parties or by the order of the Court. With regard to the latter, sections 86 and 87 of the Transfer of Property Act must be read together in foreclosure suits. It is under clause 2 of section 87 that the foreclosure becomes absolute; and it is when this takes place that there is an end of the debt. It would appear, from section 88, that a person who seeks sale in a foreclosure suit must apply when the first order, (or order nisi) is made; and that if an order be not made then it cannot be made. In England it is otherwise. Section 89 is the second section which provides for the extinction of the right to redeem.

(1) L.R., 13 I.A., 66; I.L.R., 10 Bom. 461 at p. 467.

(3) I.L.R., 13 Bom., 567.

(5) I.L.R., 4 All., 481.

(7) I.L.R., 19 All., 202.

(9) I.L.R., 18 Calo., 139 at p. 142.

(2) I.L.R., 7 Bom., 467.

(4) 3 N.W.P.H.C.R., 62.

(6) I.L.R., 11 All., 386.

(8) 22 W.R., (C.R.), 172.

(10) I.L.R., 7 Bom., 532.

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VEDAPURATTI Section 92 provides for a decree *nisi*, which has not that effect.
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 VALLABHA It is under section 93 and not under section 92, that a plaintiff's
 VALIYA right to redeem is extinguished. It is submitted (firstly) that
 RAJA. until an order absolute is passed the equity of redemption subsists;
 (secondly) that where there is an equity to redeem there is power to enforce it. *Karuthasami v. Jaganath*(1) has hitherto been the leading case in this presidency on the point. The latest, namely, *Narayana Reddi v. Papayya*(2) is an authority for two propositions: (i) that the order *nisi* does not extinguish the equity of redemption, and (ii) that the mortgagor is entitled to enforce it up to the time when application for foreclosure is made, and not later. Moreover, since *Vallabha Valiya Rajah v. Vedapuratti*(3), the rule has been that no step could be taken until application has first been made by the mortgagee. *Narayana Reddi v. Papayya*(2) was followed in *Somesh v. Ram Krishna Chowdhry*(4), a suit for foreclosure, which also refers to *Poresk Nath Mojumdar v. Ramjodu Mojumdar*(5). *Rahim Ilahi Khan v. Ghasita*(6) concurs with *Poresk Nath Mojumdar v. Ramjodu Mojumdar*(5), and holds that the right to redeem subsists until the order absolute is passed. The decision in *Rahim Ilahi Khan v. Ghasita*(6) is to the same effect. The date for payment is deemed by implication to be extended. *Elayadath v. Krishna*(7) dissented from *Poresk Nath Mojumdar v. Ramjodu Mojumdar*(5). *Kanara Kurup v. Govinda Kurup*(8) was a suit for redemption. With these two cases before the High Court, the contention was justified that the previous Madras cases in which a second suit for redemption was held to lie were rightly decided (*Vallabha Valiya Rajah v. Vedapuratti*(3)); and it must be taken as deciding that the equity of redemption cannot be asserted in execution of the decree. It is submitted that *Poresk Nath Mojumdar v. Ramjodu Mojumdar*(5) is right, and that an extension of time should be granted. In *Ramunni v. Brahma Dattan*(9), Muttusami Ayyar, J., does not merely bow to the authority of the previous cases, but analyses the Act and approves of the decisions. The Court is now asked to dissent from the judgments of ten Judges, delivered during

(1) I L R. 8 Mad., 478.

(3) I L R., 19 Mad., 40.

(5) I L R., 16 Cal., 246

(7) I L R., 13 Mad., 267

(9) I L R., 15 Mad., 366.

(2) I L R., 22 Mad. 133.

(4) I L R., 27 Cal., 705.

(6) I L R., 20 All., 375.

(8) I L R., 16 Mad., 214.

a period of about twenty years. In *Gan Savant Bal Savant v. VEDAPURATTI Narayan Dhond Savant*(1), Kemball, J., refers to *Sheikh Golam Hoosein v. Musumat Alla Rukhee Beebee*(2), in which Turner, J, v.
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RAJA. was a party. But Turner, J., put that decision aside as not affecting the question in *Karuthasami v. Jaganatha*(3). Then Kemball, J., refers to *Anrudh Singh v. Sheo Prasad*(4). There the Judges simply say that the question was decided in the case referred to. But in *Muhammad Sami-ud-din Khan v. Mannu Lal*(5), Straight, J., considers *Aarudh Singh v. Sheo Prasad* (4) wrongly decided. The argument of the other side is fallacious in losing sight of the circumstances peculiar to mortgage suits, one of which is that, though there may have been a decree passed under section 92, the equity of redemption subsists and is not merged in the decree. In *Karuthasami v. Jaganatha*(3), Turner, C.J., considers the question with due regard to that peculiarity; nor is that case in conflict with the later one, *Ramasami v. Sami*(6). In *Muhammad Sami-ud-din Khan v. Mannu Lal*(5), the decision is that a second suit lies. [He referred to *Dondh B hadur Rai v. Tik Narain Rai*(7), which at page 255 has the phrase "so long as the relationship of mortgagor and mortgagee subsists"; to *Marshall v. Shrewsbury*(8), in which the mortgagor was allowed to succeed in a second suit for redemption; to Form No. 129 of schedule IV of the Civil Procedure Code, the object of which, he contended, is to make it clear that there can be no foreclosure by implication, and that the right to redeem shall subsist until a final decree absolute has been passed.] An express order for foreclosure can alone prevent the right of redemption from being exercised, and such an order absolute can only be made under circumstances in which a foreclosure decree can be passed. So, for example, if a suit is withdrawn without leave under section 373 of the Code, a second suit for redemption is not barred, because there is no decree absolute, and that is the only act of the Court which can put an end to the right to redeem. In *Sri Rajah Papamma Rao Bahadur v. Sri Vira Pratapa Korkonda* (9), though there was a decree which contemplated redemption by the mortgagor, he never redeemed,

(1) I.L.R., 7 Bom., 467.

(2) 3 N.W.P.H.C.R., 62.

(3) I.L.R., 8 Mad., 478

(4) I.L.R., 4 All., 481.

(5) I.L.R., 11 All., 386.

(6) I.L.R., 17 Mad., 96.

(7) I.L.R., 21 All., 251 at p. 255.

(8) L.R., 10 Ch. App., 250.

(9) L.R., 23 I.A., 32; I.L.R., 19 Mad., 249.

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but afterwards brought a second suit for redemption, which was decreed. [He also referred to *Roy Dinkur Doyal v. Sheo Golam Singh*(1); Daniell's 'Chancery Practice,' 6th edition, pages 788, and 480; Robbins on 'Mortgage,' volume II, page 1042; *Union Bank of London v. Ingram*(2).] It is submitted that the weight of authority is in favour of our contention; that apart from the Transfer of Property Act it is so, that by the Transfer of Property Act the Legislature has enforced that view; and that the course of decisions should not be disturbed.

Sundara Ayyar, in reply, referred to a class of cases, of which *Tirugnana Sambandha Pandura Sannadhi v. Nullatambi*(3) is one, in which the mortgages were usufructuary, it being held that inasmuch as the entire usufruct had not as yet been worked out, the time for redemption had not arrived, and consequently a subsequent suit for redemption could be maintained.

The Court expressed the following OPINIONS:—

SIR ARNOLD WHITE, C J.—The question which has been referred in this case is whether, notwithstanding the institution of a suit and the passing of a decree for redemption, a subsequent suit for redemption of the same mortgage can be brought when the decree in the former suit has not been executed. I take it that for the purposes of this reference the words "when the decree in the former suit has not been executed" mean when the order provided for by section 93 of the Transfer of Property Act for foreclosing the right to redeem, or for sale, as the case may be, has not been made.

The view which has been generally adopted by this High Court, though the decisions are not altogether uniform, is that a second suit will lie. The Bombay and Allahabad High Courts have held otherwise.

The answer to the question appears to me to depend—not upon whether or not at the time of the bringing of the second suit the relation of mortgagor and mortgagee subsists between the parties, but upon whether the mortgagor is precluded, by the operation of the doctrine of *res judicata*, by reason of the adjudication which he has already obtained, from bringing a second suit.

On the construction of sections 92 and 93 of the Transfer of Property Act it is perfectly clear that the equity of redemption

(1) 22 W.R., (C.R.), 172.

(2) L.R., 20 Ch.D., 463.

(3) I.L.R., 16 Mad., 486.

remains unforesclosed, and the relation of mortgagor and mortgagee continues, until the order absolute which is contemplated by section 93 is made. Section 92 requires the Court if the plaintiff succeeds (*ie*, if the plaintiff establishes that he is entitled to the decree which by section 92 the Court is empowered to make) to order that, if the plaintiff pays in pursuance of the order of the Court, certain things shall be done, and that if he does not pay certain legal consequences shall ensue. Section 93 provides that, if payment in pursuance of the order of the Court has not been made, the defendant may apply, and the Court shall order, that the mortgaged property be sold or the plaintiff's right to redeem be foreclosed, as the case may be; and the section expressly enacts that on the making of an order under the section the right to redeem and the security shall both be extinguished. If the right to redeem is only extinguished when an order is made under section 93, it follows that the right is a subsisting right until the order is made. It does not, however, follow that the right is enforceable by means of a second redemption suit. It seems to me that though the right subsists the remedy is barred by operation of the rule of law which is embodied in section 13 of the Code of Civil Procedure. The Legislature has laid down what is the "matter in issue" in a redemption suit. In order to succeed the mortgagor has to show that he is entitled to a decree ordering that if he pays off the mortgage debt in pursuance of the order of the Court, the mortgagee shall re-transfer the property and if necessary put him in possession. The matter in issue is—aye or no—is the mortgagor entitled to the decree which, if he succeeds, the Court is required by section 92 to make. The question whether a decree under section 92 operates as *res judicata*, as a final adjudication on the matter in issue between the same parties, is, as it seems to me, entirely different from the question whether such a decree is in itself capable of execution without the order absolute which is contemplated by section 93 having been made.

As regards the authorities, the view which has usually prevailed in this Presidency, as already observed, has been that a second suit will lie.

In *Sami v. Somasundram*(1), *Periandi v. Angappa*(2) and *Karuthasami v. Jaganatha*(3), where it was held that a second suit

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(1) I L R, 6 Mad, 119

(2) I L R., 7 Mad., 423.

(3) I L R., 8 Mad., 478.

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would lie, the decree in the first suit contained no direction that in default of payment by the mortgagor the equity of redemption should be foreclosed. In the case in which the present reference has been made the decree directed (the mortgage being a usufructuary mortgage) that if the mortgagor failed to pay in pursuance of the order of the Court the property should be sold. Possibly the present case may be distinguished from the earlier authorities upon this ground, but it seems to me that, so far as the question of *res judicata* is concerned, it is immaterial whether or not the decree in the first suit directs that if the mortgagor does not pay as ordered by the Court the equity of redemption should be foreclosed or the property should be sold. The basis of the decision in *Periandi v. Angappa*(1), and in the later Madras cases in which the same view was adopted, was that at the time the second suit was brought the relation of mortgagor and mortgagee still subsisted. But, as I have said, the question is not what are the rights of the mortgagor, but what, in the events which have happened, is the legal remedy which is open to him to enforce these rights. In *Ramunni v. Brahma Dattan* 2), the question again came up for consideration and was fully discussed by Sir Muttusami Ayyar and Mr Justice Best who re-affirmed the view adopted in the earlier Madras cases and dissented from that of the Bombay High Court in *Gan Savant Bul Savant v. Narayan Dhond Savant*(3). Sir Muttusami Ayyar observes that the Madras decisions are more consistent with the scheme of the Transfer of Property Act while the Bombay decisions introduce a doctrine of constructive foreclosure founded on the plea of *res judicata*. This observation appears to have been made with reference to the Bombay decision in *Maloji v. Saguji*(4). I agree that any doctrine of constructive foreclosure is foreign to the scheme of the Transfer of Property Act. (As a matter of fact the Transfer of Property Act did not apply in Bombay at the time these two cases were decided.) As regards the earlier Bombay case to which I have referred, the judgment of Sir Raymond West is not based on any such technical ground but on the general principles of the law of *res judicata*. The precise point came before a Division Bench in *Ramasami v. Sami*(5), where it was held that a second suit for redemption would

(1) I.L.R., 7 Mad., 423

(3) I.L.R., 7 Bom., 467.

(5) I.L.R., 17 Mad., 96.

(2) I.L.R., 15 Mad., 366.

(4) I.L.R., 13 Bom., 567.

not lie. I agree with the conclusion at which the Court arrived, but with all respect to the learned Judges who decided that case, it seems to me that the matter was *res judicata*, not because the decree under section 92 became final at the expiry of the time fixed for payment thereby, although no order had been made under section 93, but because the matter in issue became *res judicata* as between the parties from the time the mortgagor's right to redeem was adjudicated on by a decree made under section 92. In the Full Bench Case of *Vallabha Valiya Rajah v. Vedapuratti*(1), the question referred was whether, after the expiration of the time mentioned in the decree and before any order for sale, the mortgagor is precluded from redeeming the property. The actual point decided was that after the expiration of the time mentioned in the decree and before any order for sale it was not open to the plaintiff to apply for execution of the decree. The question now before us was only dealt with incidentally in that case, and the decision cannot be put higher than that the learned Judges dealt with the case before them upon the assumption that a second suit will lie, and that the earlier Madras cases, assuming them to be good law, show that the mortgagor who has allowed the time fixed for payment to expire, is not without a remedy. It is to be observed that in the case which came before the Full Bench there had been no formal application for an extension of time and the question whether there is power to extend the time on the application of the mortgagor after the expiry of the time fixed, and without any application for sale or foreclosure being made by the mortgagee, appears to be still open so far as the decisions of this High Court are concerned. In Bombay it has been expressly held that under the proviso to section 93 of the Act an application to extend the time for redemption fixed by the original decree may be made at any time before the order absolute is made (*Nandram v. Babaji*(2)). In *Namappa Chetti v. Chidambaram Chetti*(3), a Division Bench again adopted the view which has usually prevailed in this Court and held that, inasmuch as the relation of mortgagor and mortgagee had not been put an end to, a second suit would lie. The learned Judges, however, were of opinion that, though the right of the mortgagor for a decree under section 92 was not *res*

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(1) I.L.R., 19 Mad., 40.

(2) I.L.R., 22 Bom., 771.

(3) I.L.R., 21 Mad., 18.

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judicata, the findings in the previous suit as to the amount of the debt and the extent to which it bound the estate were *res judicata*. With all deference it seems to me that, for the purpose of the question of *res judicata*, it is difficult to make a valid distinction between the findings of fact as to the conditions upon which the mortgagor is entitled to redeem and the adjudication in law that the mortgagor is entitled to redeem on complying with certain prescribed conditions.

As regards the Bombay authorities, I have already referred to the cases of *Gan Savant Bal Savant v. Narayan Dhond Savant*(1) and *Maloji v. Sagaji*(2). As regards the latter case it is not necessary to express an opinion as to whether, in so far as the decision goes beyond the point now before us, the case was rightly decided.

As regards the Allahabad High Court, the question was considered by Sir John Edge and Mr. Justice Blair in *Raja Ram Singhji v. Chunni Lal*(3), and by Sir Arthur Strachey and Mr. Justice Knox in *Dondh Bahadur Rai v. Tek Narain Rai*(4). In the former case the learned Judges expressed the view that a second suit was precluded by section 13 of the Civil Procedure Code. In the latter case it was held that the dismissal of a suit for redemption on the ground that the mortgagor had not prior to its institution paid or tendered the mortgage money at a time authorised by the deed, did not operate as foreclosure or *res judicata* so as to bar a second suit. It seems to me that this case may be distinguished on the short ground, that the cause of action in the second suit was different from that in the first. Prior to the institution of the first suit tender as authorised by the deed had not been made. Prior to the institution of the second suit such tender had been made. Further, in the Allahabad case the mortgagor's suit had been dismissed whilst in the present case the mortgagor obtained the decree for which he sued. It may well be that the English rule that a suit for the redemption of a legal mortgage which is dismissed for any reason except want of prosecution operates as a decree for foreclosure (see *Marshall v. Shrewsbury*(5)) has no place in the Indian law of mortgage. If it has not, the equity of redemption in such a case would remain unforeclosed, but, it does not follow that a mortgagor who has

(1) I.L.R., 7 Bom., 467.

(3) I.L.R., 19 All., 205.

(5) L.R., 10 Ch. App., 250.

(2) I.L.R., 13 Bom., 567.

(4) I.L.R., 21 All., 251.

brought his suit and failed can seek the aid of the Court by another suit for the purpose of enforcing his right. Still less does it follow when the mortgagor has brought his suit and obtained his decree that a second suit is maintainable. As pointed out by Sir Arthur Strachey the incidents of a Welsh mortgage closely resemble those of a usufructuary mortgage under the Transfer of Property Act, and the learned Judge himself suggests that the decision in *Curtis v. Holcombe*(1) (where the mortgagor filed a bill for the redemption of a Welsh mortgage and obtained a decree) might be analogous to a case where, as here, the plaintiff obtained the decree for which he asked, though it was not analogous to the case before the Allahabad High Court where the plaintiff failed to obtain a decree. Moreover, Sir Arthur Strachey expressly distinguishes the earlier Allahabad decision (*David Hay v. Razi-ud-din*(2)) upon the ground that in that case there was prior decree for redemption. He observes "It is sufficient to say that, in our opinion, the principle of *David Hay v. Razi-ud-din*(2) should not be extended to a case where no decree for redemption has been passed prior to the suit before the Court."

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As regards the Calcutta High Court, the only two decisions to which our attention has been called which bear upon the point (*Siva Pershad Maity v. Nundo Lall Kar Mahapatra*(3) and *Roy Dinkur Doyal v. Sheo Golam Singh*(4)) appear to be in conflict.

For the reasons which I have stated, I think the answer to the question which has been submitted to us should be in the negative.

DAVIES, J.—The question is whether a mortgagor who has once obtained a decree for redemption can under any circumstances bring a second suit for the same relief. The solution of the question seems to me to lie in a nutshell. If the decree the mortgagor has obtained is a final decree, as the majority of this Court has held in the reference to the Full Bench in *Karuppan Chetty v. Tandavaraya Deskar*(5), a second suit must undoubtedly be barred as *res judicata* under section 13 of the Code of Civil Procedure. If, as the minority of this Court has held in the same reference, the decree the mortgagor has obtained is only a preliminary decree, then the suit is still pending, and a second suit is debarred under

(1) 6 L.J. (N.S.), Ch., 156; 34 R.R., 305.

(2) I.L.R., 19 All., 202.

(3) I.L.R., 18 Calc., 139.

(4) 22 W.R., (C.R.), 172.

(5) See *ante* p. 244.

VEDAPURATTI section 12 of the Code. On these grounds alone I would decide
v. that no second suit is maintainable.
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The particular reason for the opinion that a second suit for the redemption of a mortgage is admissible apparently is that the right to redeem subsists, apart from the decree, for the whole period of sixty years during which a suit or suits for redemption may be brought. But if that argument were sound any other right, for instance, the right to recover a debt, would also subsist until the period of limitation for bringing a suit to enforce it had elapsed. There seems to be no difference between the cases. I am not aware of any special sanctity about a right to redeem which places it on a higher footing than any other legal right in respect to the enforcement of it by a suit. In my opinion, they are all subject to the same processual law, namely, that once any right has been enforced by a suit in which a decree has been obtained, the decree becomes the embodiment of that right, and that right in its inchoate state is merged in the decree. If a second suit is allowable in any case, it must be allowable in all cases, and there is no reason why if a second suit is allowed there should not be a third, a fourth or a fiftieth suit on the same cause of action so long as the cause of action remained unbarred by limitation. In the case of a right to redeem, such suits might be brought for sixty years from the date of the mortgage, and if in any suit so brought the mortgage was acknowledged, as it could hardly fail to be, a fresh starting point for the sixty years' limitation would begin from the date of such acknowledgment, and the right to sue would thereby become in practice everlasting. I consider that this *reductio ad absurdum* conclusively shows that no second or further suit lies in a case where there has once been a suit for redemption and a decree whether preliminary or final has been obtained therein.

My answer to the reference would therefore be emphatically in the negative.

BHASHYAM AYYANGAR, J.—The circumstances which have led to the institution by the first respondent of this second suit for redeeming the mortgage of 1858, for the redemption of which identical mortgage he had already obtained a decree in Original Suit No. 3 of 1889, will be found fully set forth in *Vallabha Valiya Rajah v. Vedapuratti*(1). The mortgage being a usufructuary

(1) I.L.R., 19 Mad., 40 at pp. 50, 52.

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mortgage, the decree in Original Suit No. 3 of 1889 did not provide for foreclosure of plaintiff's right to redeem in default of payment within the time fixed in the decree for redemption, but only provided for sale of the mortgaged property (*vide* last paragraph of section 92, Transfer of Property Act). It does not appear that plaintiff ever applied under the proviso to section 93 for extending the time fixed for payment; but without obtaining any such extension he unsuccessfully attempted to redeem and recover possession of the mortgaged property by payment into Court after the day appointed. In *Vallabha Valiya Raja v. Vedapuratti*(1), it was assumed, following the opinion expressed in the decisions of this Court in *Elayadath v. Krishna*(2) and *Kanara Kurup v. Govinda Kurup*(3), that the proviso was only intended to come into play when an application has been made by the mortgagee—the defendant—for the final order for foreclosure or sale, to which he may be entitled under paragraph 2 of section 93 (Transfer of Property Act). Such assumption is possibly due to the circumstance that the proviso has been inserted in sections 87 and 93 and not in 86 and 92. The reason for not inserting it in sections 86 and 92 which relate to the passing of decrees in foreclosure and redemption suits respectively, seems to me to be obvious. If it was so inserted, the order postponing the day fixed for payment will be one for amendment of decree and will have to be passed by the Court which passed the decree, either in the first instance or on appeal confirming, varying or reversing the original decree, whereas by inserting the proviso in sections 87 and 93 the order postponing the date of payment will operate as an order passed in execution proceedings relating to the stay of execution of the decree within the meaning of section 244, clause (c) of the Civil Procedure Code (*Hulas Rai v. Pirthi Singh*(4) and *Rahma v. Nepal Rai*(5)), and can be passed by the Court executing the decree, though such Court may be different from the one which passed the decree. Though in regard to the execution of a decree the initiative will have to be taken by the party entitled to execute the decree, yet in regard to the stay of its execution, the party against whom it may be executed may take the initiative and apply for and obtain stay of execution in anticipation, or apply

(1) I.L.R., 19 Mad., 40 at pp. 50, 52.

(2) I.L.R., 13 Mad., 267 at p. 268.

(3) I.L.R., 16 Mad., 214 at p. 218.

(4) I.L.R., 9 All., 502, Note.

(5) I.L.R., 14 All., 520.

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for such stay when motion is made for execution of the decree. Under the English law, as pointed out by Shephard, J., in *Vallabha Valiya Rajah v. Vedapuratti*(1), the time for payment may be extended either on the independent motion of the mortgagor—the plaintiff—or on the hearing of an application by the mortgagee—the defendant—to make the foreclosure absolute (*Alden v Foster*(2) and *Jones v. Creswicke*(3)) and I entirely fail to see anything in the language of sections 87 and 93 of the Transfer of Property Act, to show that the salutary English practice was intended to be departed from and that the proviso for extension of the time fixed for payment cannot be availed of by the mortgagor unless and until an application is made by the mortgagee for an order for foreclosure absolute or for sale, an application which in the nature of things can be made only after the period fixed for redemption has expired. I can conceive of no intelligible reason for imputing such intention to the Indian Legislature. As observed in my judgment in *Karuppan Chetti v Tandavaraya Desika*(4) (written some days ago and before this reference came on for hearing though pronounced only to-day), the use of the word 'postpone' in the proviso to sections 87 and 93 of the Transfer of Property Act, clearly indicates that as a general rule the application for extension of the time fixed for payment is assumed to be made before the day fixed for payment, and, therefore, by the mortgagor, before the mortgagee applies for an order absolute for foreclosure or sale. In the present case, the mortgagee not having chosen to apply—evidently because he was in possession and the time fixed for redemption had expired—under paragraph 2 of section 93 for an order that the mortgaged property be sold, it was assumed that the mortgagor could apply for no extension of time, and it was pointed out (*Vallabha Valiya Rajah v. Vedapuratti*(1)) that if the law as laid down in the previous decisions of this Court in *Samu v. Somasundaram*(5), *Periandi v. Angappa*(6), *Unniun v Rama*(7), and *Ramunni v. Brahma Dattan*(8), was good law, he was not without remedy and could bring a second suit for redemption. The possibility of the mortgagor—the plaintiff—himself applying for an order for sale of

(1) I.L.R., 19 Mad., 40 at pp 50, 52

(3) 9 Sim., 304 at p 317

(5) I.L.R., 6 Mad., 119.

(7) I.L.R., 8 Mad., 415, at p. 417.

(2) 5 Beav., 592.

(4) See *ante* p 244.

(6) I.L.R., 7 Mad., 423.

(8) I.L.R., 15 Mad., 366.

the mortgaged property in pursuance of the decree, which directed sale of the property in default of payment within the time fixed, was not considered. In a suit for foreclosure, the mortgagor—the defendant—may, under paragraph 2 of section 88, apply for and obtain a decree for sale in lieu of foreclosure, though under section 67 (Transfer of Property Act) the mortgagor, as plaintiff, could bring no suit for sale, as he could in England under section 25 of the Conveyancing and Law of Property Act, 1881. Notwithstanding that section 93 (Transfer of Property Act) deals only with a mortgagee's application for an order for sale, it would on principle seem that there could be no objection to the mortgagor applying for execution of the decree passed under section 92 and obtaining an order for sale of the mortgaged property, the sale of which has been decreed under the last paragraph of section 92, in case payment is not made on or before the day fixed in the decree for redemption.

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Turning now to the general question referred to the Full Bench—apart from the special facts of the case in which the question has arisen—I am clearly of opinion that the present suit for redemption of the very same mortgage for the redemption of which a decree had already been obtained in Original Suit No. 3 of 1889 is barred as *res judicata* by section 13, Civil Procedure Code, and is also barred by section 244, Civil Procedure Code, notwithstanding that no order absolute for sale has been passed in the former suit.

In *Kameswar Pershad v. Rajkumari Ruttun Koer*(1), the Judicial Committee of the Privy Council, adverting to section 13, Civil Procedure Code, held that neither the Procedure Code of 1877 nor that of 1882 introduced any new law, but only put into the form of a Code that which was the state of the law at the time, and that the state of the law at the time was that persons should not be harrassed by continuous litigation about the same subject-matter. Though the wording of section 13, Civil Procedure Code, is not as felicitous as one might wish, it virtually reproduces the firmly established law of *res judicata*, viz., that a final decision by a Court of competent jurisdiction of a matter directly and substantially at issue between certain contending parties, shall as a plea be a bar and as evidence be conclusive in any subsequent suit between the same parties. Explanation IV to the section makes

(1) L R, 19 I A, 234, I L R, 20 Calc, 79 at p 86.

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it clear that interlocutory orders or decisions or preliminary decrees, if there be any such under the Indian law, are not 'final decisions' within the meaning of the section, having the force of *res judicata*.

In addition to the cases of *Ex parte Chinery*(1), and *Smith v. Davies*(2), which I cited in my judgment in *Karuppan Chetti v. Tandavaraya Desai*(3) as explaining what a 'final judgment' in law strictly is as distinguished from an 'order,' I may refer to Daniell's 'Chancery Practice,' 6th edition, page 788, in which it is laid down that 'where a judgment does not adjourn the consideration of the cause, it is said to be a final judgment' and to the following extract from the judgment delivered by Story, J, in *Whiting v. Bank of United States*(4) (Decisions of the Supreme Court, United States, America):—"That depends upon this; whether the decree of foreclosure and sale is to be considered as the final decree in the sense of a Court of Equity and the proceedings on that decree a mere mode of enforcing the rights of the creditor and for the benefit of the debtor; or whether the decree is to be deemed final only after the return and confirmation of the sale by a decretal order of the Court. We are of opinion that the former is the true view of the matter. The original decree of foreclosure and sale was final upon the merits of the controversy. The defendants had a right to appeal from that decree as final upon those merits, as soon as it was pronounced, in order to prevent an irreparable mischief to themselves. For if the sale had been completed under the decree the title of the purchaser under the decree would not have been overthrown or invalidated even by a reversal of the decree; and consequently the title of the defendants to the lands would have been extinguished; and their redress upon the reversal would have been of a different sort from that of a restitution of the land sold. In *Ray v. Law*(5), it was held by this Court, that a decree of sale of mortgaged premises was a final decree in the sense of the Act of Congress upon which an appeal would lie to the Supreme Court. This decision must have been made on the general ground that a decree final upon the merits of the controversy between the parties is a decree upon which a bill of review would lie, without and

(1) L R., 12 Q B D, 342 at p 345.

(2) L R, 31 Ch D, 595.

(3) See *ante* p 244.

(4) 13 Peters, 6, at p 15.

(5) 3 Cranch, 179.

independent of any ulterior proceedings. Indeed the ulterior proceedings are but a mode of executing the original decree, like the award of an execution at law." It is therefore abundantly clear that a decree for redemption passed under section 92 (Transfer of Property Act) is a final judgment or decision within the meaning of section 13, Civil Procedure Code, and falls within the first part of the definition of 'decree' in the Civil Procedure Code. Until the suit reaches that stage, it can, under section 373, Civil Procedure Code, be withdrawn with liberty to bring a fresh suit, or under section 375 be adjusted by any lawful agreement or compromise in accordance with which a decree may be passed so far as it relates to the suit, and issues may be amended or additional issues framed under section 149, Civil Procedure Code. Though in one sense, the suit is pending (*Salt v. Cooper*(1); *Collinson v. Jeffery*(2)), until the decree or judgment is worked out and satisfied, and proceedings in execution thereof are 'proceedings in suits' (explanation to section 647, Civil Procedure Code) yet after the decree (vide section 375-A, Civil Procedure Code) the suit cannot, unless the same be carried and is pending in appeal, be withdrawn with liberty to bring a fresh suit, nor superseded or varied by a compromise or adjustment except in one or two particulars (section 206, Civil Procedure Code). I presume that no one will seriously contend that a suit for foreclosure, sale or redemption can be withdrawn with liberty to sue again, after decree has been passed under sections 86, 88 or 92 (Transfer of Property Act).

In *Namappa Chetti v. Chudambaram Chetti*(3), while holding that a second suit for redemption was maintainable, in accordance with certain previous decisions of this Court, the decree in the first suit passed under section 92 (Transfer of Property Act) was held to be a final judgment operating as *res judicata* as to the relation, between the parties, of mortgagor and mortgagee in respect of the subject-matter of the suit, and also as to the amount due for redemption at the date of the former decree. I should fully concur in the decision of this Court in *Namappa Chetti v. Chudambaram Chetti*(3), holding that in that case a subsequent suit for redemption was maintainable, if the decree in the former suit had

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(1) L R, 16 Ch D, 544 at p 551

(2) [1896] 1 Ch, 644 at p 646

(3) I.L.R., 21 Mad, 18.

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been—which in fact it was not—a mere declaratory decree, not capable of execution, establishing the relation of mortgagor and mortgagee and the state of the account between the mortgagor and mortgagee at the date of the said decree, assuming that such a decree could have been passed.

If the order absolute for foreclosure or sale under section 93 is alone to be regarded as the final judgment or decision in the suit, that alone can operate as *res judicata* and the decree passed under section 92 will have to be regarded simply as an interlocutory order or proceeding which cannot have the force of *res judicata*. If this be the right view and if no order absolute for foreclosure or sale be passed, the suit will have to be regarded as still pending and section 12, Civil Procedure Code, will operate as a bar to the trial of a second suit for the same relief between the same parties.

In *Lockyer v. Ferryman*(1), on the authority of which it was held by the High Court of Bombay (*Gan Sarant Bal Sarant v. Narayan Dhond Savant*(2)) that a decree for redemption, on default of the decree-holder to pay the money within the time fixed in the decree, or if none be fixed, within the time allowed by law for execution of the decree, operates as a judgment of foreclosure and debars the mortgagor from afterwards bringing a second suit for redeeming the same property—Lord Selborne laid down that ‘when there is *res judicata* the original cause of action is gone and can only be restored by getting rid of the *res judicata*’. Lord Blackburn there explained the principle of *res judicata* as follows:—“When a competent tribunal having had a case before them have given a final judgment it is *res judicata*. I do not mean to express any opinion as to what would be a sufficient ground to re-open the case The object of the rule of *res judicata* is always put upon two grounds—the one, public policy, that it is the interest of the State that there should be an end of litigation, and the other the hardship on the individual that he should be vexed twice for the same cause.” Again, Lord Penzance, in his judgment in *Kendall v. Hamilton*(3) says, “when that which was originally only a right of action has been advanced into a judgment of a Court of Record the judgment is a bar to an

(1) L R, 2 App Cas, 519.

(2) I L R, 7 Bom, 467.

(3) L R, 4 App Cas, 504 at p 526

action brought on the original cause of action. The reasons for this result are given by Baron Parke in *King v. Hoare*(1). He says 'The judgment is a bar to the original cause of action because it is thereby reduced to a certainty and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendants to another suit for the purpose of attaining the same result. Hence the legal maxim '*Transit in rem judicatum*'; the cause of action is changed into matter of record which is of a higher nature and the inferior remedy is merged in the higher.' "

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The whole argument in support of the contention that a second suit for redemption is maintainable in the absence of an order absolute for foreclosure or sale, proceeds upon the supposition that, in spite of the express declaration [in section 2 (a) of the Transfer of Property Act] that nothing therein contained shall be deemed to affect the provisions of any enactment not thereby expressly repealed, there is some magic in sections 86 to 93 of the Transfer of Property Act and in particular in the word 'absolute' or 'absolutely' therein occurring, which overrides the fundamental principle of *res judicata* embodied in section 13, Civil Procedure Code. Section 60 (Transfer of Property Act) defining the mortgagor's right to redeem specifies the actual remedies which he is entitled to in exercising his right of redemption, the remedies, of course, being such as he would obtain in enforcement or execution of the redemption decree. Similarly section 67, in defining the mortgagee's right to foreclosure or sale, specifies the remedy he is entitled to in exercising such right, *i e*, an order that the mortgagor shall be absolutely debarred of his right to redeem or an order that the mortgaged property be sold. Such definition of the mortgagor's right of redemption and of the mortgagee's right of foreclosure or sale was relied on in the course of argument in *Karuppan Chetti v. Tandavaraya Desikar*(2) as leading to the conclusion that the decrees passed under sections 86, 88 and 92 are only 'preliminary decrees,' or decrees *nisi*, and that the 'final' decrees, capable of execution in the suits, are the orders passed under sections 87, 89 and 93 respectively. In my opinion the inference to be drawn is just the opposite. If you want to define the right which a creditor has against his debtor,

(1) 13 M & W, 491 at p 504.

(2) See *ante* p 244.

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you will have to say that he is entitled to be repaid the amount of the debt and not simply to a decree against his debtor for such payment. Sections 60 and 67 therefore declare what the mortgagor or mortgagee is actually to realize by enforcing his right, *i.e.*, the relief which he is entitled to by enforcing or executing the decree establishing his right. In the case of redemption, delivery back of the mortgage deeds, possession of the mortgaged property and a reconveyance are the reliefs (see section 60, Transfer of Property Act) which the mortgagor obtains by executing his decree for redemption. As the provisions of the Civil Procedure Code are sufficient to work out a decree for redemption no special provisions for the same are made in the Transfer of Property Act, except for the mortgagor being put in possession of the mortgaged property. Even this last seems superfluous (*vide* section 263, Civil Procedure Code); but, whether superfluous or not, the provision made for it in the first paragraphs of sections 87, 89 and 93 conclusively shows that those sections relate to the enforcement or execution of the decrees passed under sections 86, 88 and 92, and it is significant that sections 87, 89 and 93 do not provide for the passing of an order absolute for putting the mortgagor in possession, but only for the executive act of putting him in possession. In the case of a foreclosure decree, there is nothing in the Civil Procedure Code as to the mode of enforcing the same. The second paragraphs of sections 87 and 93 (Transfer of Property Act) provide that the same is to be enforced by obtaining an order of Court debarring the mortgagor absolutely of all right to redeem. This is the mode provided by the Transfer of Property Act, following the English Chancery Practice, for working out or executing a decree for foreclosure passed under section 86 or 92 (of the Transfer of Property Act) as the case may be. In addition to such order it is provided that the Court may enforce the decree, if necessary, also by delivery of possession of the property to the mortgagee, (see end of the second paragraph of section 87 and of the third paragraph of section 93) though the decree itself does not in terms provide for such delivery of possession, as it does in the case of delivery of possession to the mortgagor. I have already explained in my judgment in *Karuppan Chetti v. Tandavaraya Desikan* (1) that an application made under section 89 or 93 for an order absolute for

(1) See *ante* p 214.

sale is only an application for execution of the decree for sale passed under sections 88 and 92 and indicated the reasons for special provision being made in the Transfer of Property Act for the passing of such order for sale. Whether the decree be in a suit for foreclosure or in a suit for sale or in a suit for redemption, there is in each a conditional decree for redemption in favour of the mortgagor, the condition being the payment by the mortgagor of the amount decreed on or before the day fixed. But the Transfer of Property Act does not provide for an application being made by the mortgagor, after such payment, for an order absolute for redemption, or for the passing of any such order. This conclusively shows that the decrees passed under sections 86, 88 and 92 are not 'preliminary decrees,' or decrees *nisi*, which require to be perfected by being made absolute or unconditional, on the fulfilment of a condition or contingency subject to which the decrees were passed. But so far as the decree is one for foreclosure or sale provision is made for the mortgagee applying for an order absolute for foreclosure or sale as the case may be, to supplement the imperfect provisions of the Civil Procedure Code relating to the enforcement or execution of decrees. Decrees for specific performance, decrees respecting rights of easement and similar decrees are often made conditional, but they are not the less 'final judgments' having the force of *res judicata*. This, I venture to state, is equally so under the English law, and all decrees whether conditional or unconditional are to be worked out and enforced in execution, and the orders passed therefor are not to be regarded as the final judgment or decree in the suits but only as orders relating to the execution of the decree (vide B.S.C. Ord. 42r. 9 Ann. Practice, 1902, p 571).

In *Monkhouse v. The Corporation of Bedford* (1) the plaintiff—the mortgagee—having obtained the usual decree for foreclosure at the Rolls as mortgagee, and an appeal therefrom having been preferred to the House of Lords by the mortgagor, before the order for foreclosure absolute was passed, a motion was made by the mortgagor—the defendant—before the lower Court to suspend the execution of the decree until six months after the appeal should have been heard. The lower Court in granting the application on certain terms stated as follows:—"This decree

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(1) 17 Ves., 330.

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must therefore be taken to be right to the extent of letting execution upon it, unless the Court sees that if it turns out to be wrong the party cannot be set right again." It will be observed that in that case the decree from which an appeal was preferred to the House of Lords was the usual decree in an action by a mortgagee for foreclosure or sale, corresponding to that under section 86 of the Transfer of Property Act, and that it was treated as the final judgment in the action and as one capable of being enforced by execution pending appeal (see also *Finch v. Shaw*(1)). Similarly here also, pending appeals and second appeals from the original decree, the Court whose duty it is to execute the decree may stay execution of the same by postponing from time to time, under the proviso to sections 87 and 93, the day fixed for payment. After the passing of the decree referred to in sections 86, 88 and 92, the cause is not adjourned for further consideration, but an order for foreclosure absolute or for sale, may, in execution of the decree, be, under the English law, obtained on application made *ex parte*, supported by an affidavit, by the mortgagee or his attorney, of due attendance at the place appointed for payment and of non-payment of the amount certified to be due (see Ann. Practice for 1902, p. 773) and under the Indian law, on a verified application made under sections 230 and 235, Civil Procedure Code.

The conclusions I have arrived at both in the references made to the Full Bench in *Mallikarjunadu Shetti v. Lingamurti Pantulu*(2), &c, and in this case, as to the scheme of the mortgage chapter in the Transfer of Property Act and its relation to chapter XIX of the Civil Procedure Code, are, I venture to say, not only in strict conformity with the Transfer of Property Act—which in this respect is substantially the same as the English Chancery law—but also steer clear of the innumerable difficulties, as to the right of appeals, the period of limitation for applications under sections 87, 89 and 93, the Court which is competent to pass the orders therein mentioned, the Court fees payable in respect of appeals, &c, which will result from the position taken by the Calcutta High Court that a decree passed under sections 86, 88 or 92 of the Transfer of Property Act is only a preliminary decree, or decree *nisi*, and that it is the order passed under sections 87, 89 or 93 that constitutes the final decree or decree absolute. In the

(1) 20 Beav, 555.

(2) See *ante* p 244.

view that the decrees under sections 86, 88 and 92 are the final judgments or decisions in the suit, they will be appealable as 'decrees,' according to the first part of the definition of 'decree' in the Civil Procedure Code, and applications made under sections 87, 89 and 93 will be governed by article 179 of the second schedule to the Limitation Act, and orders thereon can be passed by the Court executing the decree and will be appealable as orders passed under section 244 (c), Civil Procedure Code—comprised within the second part of the definition of 'decree' in the Civil Procedure Code—subject according to the notification of the Government of India to the payment of the fixed Court fee prescribed by No. 11 of schedule 2 of the Court Fees Act.

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The learned Counsel for the respondent contends—and this is the contention principally relied on by him—that even if the decree passed under section 92 in the former suit be regarded as the final judgment or decision within the meaning of section 13, Civil Procedure Code, the right to redeem still subsists, inasmuch as no order absolute for sale has been made under section 93—which alone can extinguish that right—and that therefore the decree in the former suit can be no bar to the mortgagor enforcing his right of redemption in the present suit, the relation of mortgagor and mortgagee still continuing and the right of redemption being inseparable from such relation.

In support of this contention he relies upon the decisions of this Court in *Sumi v. Somasundiam*(1), *Periandi v. Angappa*(2), *Karuthasami v. Jaganatha*(3), *Ramunni v. Brahma Dattan*(4), and *Nainappa Chetti v. Chudambaram Chetti*(5), which led to the order of reference to a Full Bench in this case, as they are in conflict with the decisions of the Bombay High Court in *Gan Savant Bal Savant v. Narayan Dhond Savant*(6) and *Maloji v. Sagnji*(7) and of the Allahabad High Court in *David Hay v. Razi-ud-din*(8) and not reconcilable with the decision of this Court in *Ramasami v. Sami*(9), if the dictum of Shephard, J., in *Vallabha Valiya Rajah v. Vedapuratti*(10), that 'it would make no difference whether or not the decree pleaded in bar contained a direction for

(1) I L R., 6 Mad, 119

(3) I L R., 8 Mad, 478

(5) I L R., 21 Mad, 18.

(7) I L R., 13 Bom, 567

(9) I L R., 17 Mad, 96.

(2) I L R., 7 Mad, 423

(4) I L R., 15 Mad, 366

(6) I L R., 7 Bom, 467.

(8) I L R., 19 All, 203

(10) I L R., 19 Mad., 40 at p 51.

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 v. *Periandi v. Angappa*(2), *Karuthasami v. Jaganatha*(3), *Ramunni v.*
 VALLABHA *Brakma Dattan*(4), and *Nannappa Chetti v. Chidambaram Chetti*(5),
 VALIYA *in all of which it was held that a second suit for redemption was*
 RAJA. *maintainable—the decree in the first suit which was pleaded in*
bar contained no directions for foreclosure or sale in default of
redemption. In the first of these cases, the decree in the first suit
was left unexecuted for 15 years, but it was regarded in the
events which had happened as a declaratory decree, though he
was entitled under that decree to recover possession on making a
certain payment, and the second suit for redemption which was
based on the original mortgage was held maintainable. In the
second case, the execution of the decree passed in the first suit
was barred by limitation, and the second suit was held maintain-
able as the right to redeem had not been foreclosed. In the third
case, although the execution of the decree in the first suit was
barred by limitation, the second suit for redemption was held
maintainable on the ground that the relation of mortgagor and
mortgagee still subsisted and the right to redeem was inseparable
from such relation so long as it existed. The same view was
taken in Ramunni v. Brakma Dattan(4). These decisions were
 followed in *Nannappa Chetti v. Chidambaram Chetti*(5), but in all
 these cases the decision proceeded expressly on the ground that
 the decree in the first suit which was pleaded in bar contained no
 direction for foreclosure or sale in default of payment. But I
 agree with the dictum of Shephard, J., in *Vallabha Valiya Raja*
v. Vedapuratti(6) already referred to, that inasmuch as it is the
 order of foreclosure absolute or sale that extinguishes the right of
 redemption and not the mere passing of the decree with a direction
 for foreclosure or sale in the event of non-payment on or before
 the day fixed, it can make no difference whether the decree did or
 did not contain a direction for foreclosure or sale. In the present
 case, the decree in the first suit did contain a direction for sale
 in default of payment, but, for the reasons already stated, the
 mortgagee, the defendant, did not choose to apply for an order
 absolute for sale. This case is like *Ramasami v. Sami*(7) in which it

(1) I L R, 6 Mad, 119

(3) I L R, 8 Mad, 478.

(5) I L R, 21 Mad, 18.

(7) I L R, 17 Mad, 96.

(2) I L R, 7 Mad, 423.

(4) I L R, 15 Mad, 366.

(6) I L R, 19 Mad, 40 at p 51.

was held that a subsequent suit for redemption was barred by a decree for redemption in a former suit,—which decree provided that in default of redemption within the time limited thereby the right of redemption was to be foreclosed—though no order for foreclosure absolute had been made under section 93. But if the decisions of this Court in the other cases are sound (*i.e.*, in *Sami v. Somasundram*(1), *Periandi v. Angappa*(2), *Karuthasami v. Jaganatha*(3), *Ramunni v. Brahma Dattan*(4), and *Nannappa Chetti v. Chudambaram Chetti*(5), the case in *Ramasami v. Sami*(6) and the present case cannot be logically distinguished therefrom simply on the ground that in those cases the decree in the first suit contained no direction for foreclosure or sale.

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With all deference to the learned Judge, I find it impossible to adopt the reasoning on which the decisions of this Court in *Sami v. Somasundram*(1), *Periandi v. Angappa*(2), *Karuthasami v. Jaganatha*(3) and *Ramunni v. Brahma Dattan*(4), proceed and the conclusions arrived at therein. If those decisions are sound, there can be no limit to the number of successive suits for redemption of the same mortgage and the fundamental principle on which the doctrine of *res judicata* is founded will have to be wholly ignored. If the principle of these decisions be—as it must—that so long as the relation of mortgagor and mortgagee is not extinguished by act of parties or by order of Court under sections 87, 89 or 93 of the Transfer of Property Act, or by section 28 of the Limitation Act, the right of redemption is inseparable from such relation, and that therefore there can be no impediment to the mortgagor's bringing a suit for redemption although he had already obtained a decree for redemption, it will necessarily follow that he can institute in succession as many suits as he chooses for redeeming one and the same mortgage, and the mortgagee as many suits as he chooses for foreclosure or sale; for the right of redemption and the mortgage security are not extinguished until the passing of an order for foreclosure absolute or for sale. Even if the execution of the decree in the first suit be not barred by limitation, there will be nothing to prevent his instituting another suit for redemption, foreclosure or sale as the case may be. And if he can do so there will be nothing to preclude the defendant in

(1) I L R., 6 Mad., 119

(3) I L R., 8 Mad., 478.

(5) I L R., 21 Mad., 18

(2) I L R., 7 Mad., 423

(4) I L R., 15 Mad., 366.

(6) I L R., 17 Mad., 96.

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the subsequent suit from applying, in execution of the decree in the former suit, for redemption, or for an order for foreclosure absolute or for sale as the case may be, if the execution of the decree therein be not barred by the law of limitation.

In considering whether the plea of *res judicata* operates as a bar to the suit, the question is not whether the alleged relation of mortgagor and mortgagee or any other legal relation between the parties to the suit subsists, but whether, assuming the same to subsist, the plaintiff is not precluded from seeking to enforce his right by reason of his having already sued upon the same cause of action and obtain an adjudication which it was competent for him to enforce and execute. If one obtains a mere declaratory decree, establishing a certain right, of the nature contemplated in section 42 of the Specific Relief Act, and thereafter brings a subsequent suit to obtain a relief consequent upon such right, the decree in the former suit cannot as a plea be a bar to the subsequent suit, though as evidence it will be conclusive in his favour as to the right adjudicated upon therein. But a person who has obtained a decree establishing his right and entitling him to the consequential relief, cannot again sue for the same but can only work out his right and obtain the relief by executing the decree. And section 244, Civil Procedure Code, expressly prohibits a separate suit for the purpose.

Applying this principle to a mortgagor's right of redemption, we find a complete definition of that right or cause of action in section 60 of the Transfer of Property Act. The former suit in the present case was founded upon that cause of action and after a decree had been given therein under section 92 of the Transfer of Property Act, the 'original cause of action is gone and can only be restored by getting rid of the *res judicata*,' as observed by Lord Selborne in *Lockyer v. Ferryman* (1) above referred to. The cause of action having thus been exhausted, there is no original cause of action, either in whole or in part, on which the mortgagor can again sue for redemption. If he allowed the execution of that decree to become barred or was otherwise unable to execute the decree by reason of his not complying with the terms of the decree, the original cause of action, or any portion thereof, will not thereby revive. Under the proviso to section 93 of the Transfer

(1) L R, 2 App. Cas, 519.

of Property Act, it was, in my opinion, competent for him to obtain postponement of the day fixed for payment of the money, provided he satisfied the Court that there was good and sufficient cause for his not being able to pay the amount on or before the day fixed. If he can be allowed to bring a fresh suit for redemption, this provision of the Transfer of Property Act that the time for redemption could be extended only on good cause, will be indirectly evaded.

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It is true that until there is an order for foreclosure absolute or sale the right of redemption is not extinguished and there was no such order in the present case. That will not entitle him to bring a new suit for redemption, but he can exercise his right of redemption under the decree, if he be not barred by limitation, by obtaining a postponement of the day fixed for payment, if he makes out a good cause for such extension of time. That the decree itself does not operate to extinguish the right of redemption by efflux of the time limited in the decree, but such extinguishment is postponed until the actual passing of an order for foreclosure absolute or sale, is really a concession in favour of the mortgagor so as to enable him to obtain an extension of time on good cause shown, even after the expiration of the period fixed in the decree, whereas if the decree itself operated so as to extinguish the right of redemption on the expiration of the period fixed in the decree such extension cannot be made and, in fact, if made, will be inoperative. Full effect is thus given to the provision made in the Transfer of Property Act in accordance with the Chancery Practice in England, for extinguishing the right of redemption only on the passing of an order for foreclosure absolute or sale, the only difference between the English and Indian laws being that under the former the order dismissing the suit for redemption in default of payment operates as the order of foreclosure absolute here passed under section 93 of the Transfer of Property Act.

In the case of mortgage-decrees there is provision made for extinguishment of the security and of the right of redemption, but in the case of decrees in ejectment and other decrees there is no such provision, and section 28 of the Limitation Act applies only to suits and not to the execution of decrees. If the owner of property obtains a decree in ejectment against a trespasser or a tenant whose tenancy has expired, can he bring another suit in

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ejectment on his original cause of action as owner or landlord, on the ground that his ownership has not been extinguished by the decree in the former suit or by any order passed therein subsequent to decree? If a mortgagor is to be at liberty to bring successive suits for redemption subject only to the extraordinarily long period of limitation applicable to suits for redemption, it will be difficult to discover or suggest a reason for denying such liberty to the owner of property who seeks to eject a trespasser, subject, of course, to the comparatively short period of limitation applicable thereto. There are numerous instances in which the right of action alone is extinguished or destroyed, though the right of property to which it relates has not been extinguished. Thus, if a suit is dismissed under section 102, Civil Procedure Code, for default of plaintiff's appearance, or the plaintiff withdraws the same (section 373, Civil Procedure Code) without obtaining permission to bring a fresh suit on the same cause of action, the right of action is extinguished and he is precluded from bringing a fresh suit on the same cause of action, though his substantive right of property may not be extinguished, and the dismissal or withdrawal may not even operate as *res judicata* against him in respect of his right of property. Similarly, if a plaintiff omits to sue in respect of any portion of his claim, he is precluded (section 43, Civil Procedure Code) from suing in respect of the portion so omitted, though his right in respect of such portion may not be extinguished. I fancy that the result will be the same even if the suit so dismissed or withdrawn or portion omitted is by a mortgagor or mortgagee as the case may be. Certainly the result must *a fortiori* be the same if a decree has been given, and thus not only has the original cause of action gone, but the decree also operates as *res judicata* in respect of the right adjudged.

In regard to a mortgagee's title in default of redemption by the mortgagor, the obtaining of an order for foreclosure absolute or of an order dismissing the mortgagor's suit for redemption [which has the effect of an order for foreclosure absolute] is necessary to perfect his title as owner [see Daniell's 'Chancery Practice,' 6th edition, page 1405; *Prees v. Coke*(1)]. Under the English law such an order operates as a 'conveyance on sale' and has to be stamped *ad valorem* as such [vide sections 54 and 57 of the English

(1) L R, 6 Ch. App., 615.

Stamp Act, 1891, and section 6 of the English Finance Act, 1898]. In *Wills v. Luff*(1), Chitty, J., says that after the passing of an order for foreclosure absolute, "the action is at an end with the exception of the settlement of a conveyance by the Judge if the parties differ." Such conveyance is exempt from the payment of *ad valorem* stamp duty (proviso (b) to section 6 of the English Finance Act, 1898), if such duty had been paid upon the decree or order for foreclosure absolute. A release by the mortgagor after judgment of foreclosure is equivalent to an absolute foreclosure by order (*Reynoldson v. Perkins*(2)), and no order of foreclosure absolute need be obtained. Under the Transfer of Property Act the order of foreclosure absolute passed in execution of the decree operates judicially as an extinguishment of the right of redemption and as transfer of property in execution of decree or order of a Court [section 2 (d) of the Transfer of Property Act] and the title of the mortgagee as owner is thus perfected and completed. The effect of an order of foreclosure absolute obtained by a legal mortgagee is to vest the ownership and beneficial title to the mortgaged land, for the first time, in the mortgagee (*Heath v. Pugh*(3), Court of Appeal; (same case) on appeal to the House of Lords(4)). Under the English Chancery Practice, even after order of foreclosure absolute, the foreclosure can be reopened on good and sufficient cause [*Ford v. Wastell*(5); *Wills v. Luff* (1); Daniell's 'Chancery Practice,' 6th edition, page 1406)].

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I shall now proceed to consider some decisions of the other High Courts bearing upon the question now under consideration. In *Chaita v. Purum Sookh*(6) it was held by a Division Bench of the North-West Provinces High Court (Morgan, C.J., and Spankie, J.) that when a decree for redemption is obtained but not executed within the prescribed period for execution, the mortgagee does not, by such omission, cease to be the mortgagee, but the mortgagor or his representative may still maintain a fresh suit for redemption. In *Doobee Singh v. Jowkee Ram*(7) it was held by a Full Bench of the same High Court (Morgan, C.J., Roberts, Pearson, Turner and Spankie, JJ.) that when the nature of the decree is such that it could be executed, the decree-holder cannot bring a fresh suit

(1) L.R., 38 Ch D, 197 at p. 200

(3) L.R., 6 Q B.D., 345 at pp. 359-61.

(5) 2 Ph., 591

(7) 3 Agra H C R., 381.

(2) Ambl., 564 at p. 565.

(4) L.R., 7 App. Cas., 235.

(6) 2 Agra H.C.R., 256.

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founded upon the cause of action which has already been adjudicated upon and also upon the decree the execution of which was allowed to be barred by the law of limitation. In *Sheik Goolam Hoosein v. Mussumat Alla Rukhee Beebee*(1) a Full Bench of the same High Court (Morgan, C.J., Ross, Turner, Spankie and Turnbull, JJ.), following the last-mentioned Full Bench decision, held that a mortgagor who had obtained a decree for possession of the mortgaged property on the ground that the mortgage has been satisfied, but allowed the execution of the decree to become barred by limitation, cannot maintain a subsequent suit based on his old title and be permitted to revert to the position which he held prior to the institution of the first suit and to ask for remedy by a fresh suit. This was followed in 1882 by a Division Bench of the same High Court (Straight and Mahmood, JJ.) in *Anrudh Singh v. Sheo Prasad*(2) in which it was held that a mortgagor who had obtained a decree for redemption, but has allowed the execution of the same to become barred by limitation cannot bring a fresh suit to redeem the same mortgage. In *Muhammad Sami-ud-din Khan v. Mannu Lal*(3), a Division Bench of the same High Court (Straight and Broadhurst, JJ.) in 1889 held that the Full Bench decision in *Sheik Goolam Hoosein v. Mussumat Alla Rukhee Beebee*(1) was not binding since the passing of the Transfer of Property Act, and a second suit for redemption was decreed. I need hardly say that there is nothing in the Transfer of Property Act which militates against the authority of the Full Bench decision, if it was good law—as in my opinion it was—before the Transfer of Property Act. But if the decision in *Muhammad Sami-ud-din v. Mannu Lal*(3) was based, as apparently it purports to be, on the ground that the former suit for redemption was premature inasmuch as, at the date of the former suit, the usufruct had not liquidated the mortgage debt and that therefore the term of the usufructuary mortgage had not expired, the decision would probably be right. The same High Court (Edge, C.J., and Burkitt, J.) in *David Hay v. Razi-ud-din*(4) after reviewing all the previous decisions of that Court, as well as the decisions of the High Courts of Madras and Bombay, held that a mortgagor, whether under a simple or usufructuary mortgage, who had

(1) 3 N.W.P.H.C.R. 62

(2) I.L.R., 11 All., 386

(3) I.L.R., 4 All., 481.

(4) I.L.R., 19 All., 202.

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obtained a decree for redemption and allowed such decree to lapse by reason of his not paying the decretal amount within the time limited for payment by the decree, cannot subsequently bring a second suit for redemption of the mortgage in respect of which such infructuous decree had been obtained. The Full Bench decision of the same Court in 1871 was approved and followed as also the decision of the Bombay High Court in *Maloji v. Sagaji*(1). The decision in *Muhammad Sami-ud-din v. Mannu Lal*(2) was dissented from, as also the decisions of this Court in *Sami v. Somasundram*(3), *Periandi v. Angappa*(4), and *Ramunni v. Brahma Dattan*(5), on the ground that "the view of the law to be found in those cases is not supported by the law as administered in such matters in England or the law as enacted in the Civil Procedure Code or the Transfer of Property Act," and that the Full Bench decision in 1871 "was not affected by the Transfer of Property Act and is in harmony with that Act and is perfectly sound law." It was further held that the "allowance of a second suit for redemption would be to go contrary to the principle of section 244, Civil Procedure Code, and that the fact that a mortgagor has failed to comply with his decree for redemption within time cannot give him a fresh cause of action."

The question was again considered by a Division Bench of the same High Court (Strachey, C.J., and Knox, J.) in 1899, in *Dondh Bahadur Rai v. Tek Narain Rai*(6). In that case the simple question was whether a decree in a suit for redemption of a usufructuary mortgage, not being a conditional decree for redemption under section 92 (Transfer of Property Act), but simply dismissing the suit on the ground that the mortgagor had not prior to its institution paid or tendered the mortgage money at a time authorised by the mortgage deed, had the effect of foreclosure or of *res judicata*, so as to bar a second suit for redemption which was brought after tender of the whole of the mortgage money at the time appointed in the deed, between the dismissal of the first suit and the institution of the second. It was held—and if I may venture to say so rightly—that the second suit was maintainable and that the decision in *David Hay v. Razi-ud-din*(7) was clearly distinguishable.

(1) I.L.R., 13 Bom., 567.

(3) I.L.R., 6 Mad., 119.

(5) I.L.R., 15 Mad., 336.

(7) I.L.R., 19 All., 202.

(2) I.L.R., 11 All., 386.

(4) I.L.R., 7 Mad., 423.

(6) I.L.R., 21 All., 251.

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The first suit, having been dismissed as premature, whether rightly or wrongly, on the ground that the cause of action had not then arisen, could be no bar to the subsequent suit which was brought after the cause of action had accrued according to the decision in the former suit. The Chief Justice, however, proceeded to refer to the conflict of decisions between the case in *David Hay v. Razi-ud-din*(1) and the Full Bench decision of 1871 on the one hand, and that in *Muhammad Sami-ud-din Khan v. Mannu Lal*(2) and the decisions of the Madras High Court and a decision of the Calcutta High Court in *Roy Dinkur Doyal v. Sheo Golam Singh*(3) on the other, and observed that the proposition of law as enunciated in *David Hay v. Razi-ud-din*(1) cannot be regarded as "absolutely settled law"

Turning now to the decisions of the Bombay High Court, the case of *Gan Savant Bal Savant v. Narayan Dhond Savant*(4) is exactly in point; and in fact it is stronger than the present case, inasmuch as there the decree which was pleaded in bar of the second suit did not direct foreclosure. West, J., in concurring with Kemball, J., that a decree for redemption, on default of the decree-holder to pay the money declared to be due within the time fixed by the decree, or if none be fixed within the time allowed by the law for execution of the decree, operates as judgment of foreclosure and debars the mortgagor from afterwards bringing a second suit to redeem the property, observes as follows:—"It follows then from the leading principle of *res judicata* that the same matter shall not be agitated again on the original ground so as to imperil the stability of the decision formerly given. 'Where there is *res judicata*, the original cause of action is gone and can only be restored by getting rid of the *res judicata*' The existence of a decree in plaintiff's favour may seem not to be a good reason for depriving him of a right to sue, and under the Roman law the plea of *res judicata* could be met by a replication of '*res secundum se judicata*' Under the English law also, a judgment, it is said, is a bar only when it has negatived the right—per Bramwell, L.J., in *Poyser v. Minors*(5); but this holds generally only when the cause of action in the second suit has arisen on the same original right at a different time from the first, or the first action went off on a mere

(1) I.L.R., 19 All., 202

(3) 22 W.R., (C.R.), 172

(5) L.R., 7 Q.B.D. 329 at p. 338.

(2) I.L.R., 11 All., 386.

(4) I.L.R., 7 Bom., 467

technical defect. Under the Anglo-Indian law it has long been recognized that a decree-holder must obtain satisfaction of his decree by execution, not by another suit—*Kisan Nandram v. Anandram Bachaji*(1), *Fakirapa v. Pandurangapa*(2). A new suit cannot be brought either on the original cause of action or, save in special cases, on the decree in which that cause had become merged. The object of the Legislature has been to prevent continued litigation on the same grounds and this would obviously be defeated by allowing a decree-holder to abstain from putting his decree in force and proceed again on the same cause as before." Pinhey, J, who dissented from the majority, based his dissent on another point, *ie*, that the plaintiff in the second suit could not be regarded as having been represented by the plaintiff in the first suit. The next case in the same Court is *Maloji v. Sagaji*(3). This is a very instructive case and here the principle of *res judicata* as a bar to the second suit was carried further than is necessary in the present case. The first suit was brought as one for redemption and the decree therein did not provide for payment of the mortgage-debt within a fixed time, nor for foreclosure or sale in case of default. The second suit was brought by the mortgagee for sale, and pending that suit and before the execution of the decree in the former suit was barred by limitation, the mortgagor paid into Court the sum directed to be paid by the redemption decree. But the mortgagee refused to accept payment and insisted upon his right of sale in the subsequent suit which he brought as plaintiff. It was held that as no time was fixed for payment in the redemption decree, the mortgagor had three years within which to execute the decree, and as he had paid the money within three years he was entitled to recover the property. It was further held that the suit brought by the mortgagee for sale was barred by the decree in the redemption suit under explanation II of section 13, Civil Procedure Code, inasmuch as the mortgagee might and ought to have, as defendant in the first suit, obtained a provision in the redemption decree for sale in default of payment.

The Transfer of Property Act was not in force in Bombay when either of the above decisions was passed. Whether or not the decision that the subsequent suit for sale which was brought.

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(1) 10 Bom., H.C.R., 433

(2) 1 L.R., 6 Bom., 7.

(3) 1 L.R., 13 Bom., 567.

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by the defendant in the former suit was barred by the decree in the first suit is strictly warranted by section 13 (explanation II) of the Civil Procedure Code, it is certainly in conformity with section 67 of the Transfer of Property Act which provides that a mortgagee can bring a suit for foreclosure or sale only before a decree has been made for redemption of the mortgaged property. It is therefore of the highest importance that decrees in mortgage suits should be complete not only so far as the rights of the plaintiff are concerned, but also in so far as the rights of the defendant are concerned; and the fact that the decree is imperfect will not enable the defendant to enforce his rights under the mortgage, as plaintiff in a suit subsequently to be brought by him, if such rights could have been enforced by him in the former suit and provided for in the decree passed therein.

In *Sua Pershad Maty v. Nando Lalkar Mahapatro*(1), it was contended that until an order absolute for sale (therein referred to as decree absolute) was made, the right to redeem existed and that the suit should be regarded as a suit to redeem. In overruling this contention Macpherson, J, observed as follows — "Even if there is no order absolute the decree *nisi* directing the sale is in existence, and if the right to redeem be still alive it cannot be enforced by a separate suit."

There are two decisions of the Privy Council which have been referred to in the course of argument and which I shall now notice. The first is *Hari Raju Chiplunkar v. Shapurji Harmasji Shet*(2). In that case a suit for redemption was brought by the representative of the mortgagors, basing the same on a decree for redemption passed in favour of the mortgagors, as defendants, in a former suit brought by the mortgagees to enforce the mortgage. The decree in the former suit was made in accordance with the award of arbitrators to the effect that the defendants therein were to pay in all Rs. 2,396 to the then plaintiffs on a day to be fixed, redeeming the mortgaged land which till payment was to remain in the possession of the mortgagees—the plaintiffs in the first suit. But no date was in fact fixed. It was held both by the High Court and by the Privy Council on appeal that the right of the mortgagor—the plaintiff—was a right to execute the above decree as defendant therein, subject to the law of limitation and not a right

(1) I L.R., 18 Cal., 139.

(2) L.R., 13 I.A., 63, I L.R., 10 Bom., 461.

to sue as for the redemption of the mortgage and obtain a decree for redemption and possession in a fresh suit based on the former decree. Their Lordships of the Privy Council, advertent to a contention raised by the appellant's Counsel that the mortgagor could fall back upon the right to redeem the original mortgage, observed as follows:—"The difficulty in the way of the appellant availing himself of that is that it is a different case from that which he made in the plaint. In the plaint he did not seek to redeem the mortgage of 1806 . . . but treated the decree as the mortgage which he sought to redeem, and supposing that he could, according to the decision of the High Court of Madras which was cited (*Periandi v. Angappa*(1)), fall back upon the mortgage of 1806, in their Lordships' opinion he is not at liberty to do that upon the present appeal. It would be making a different case from that which he made in the lower Courts and on which the case has been tried and decided." With all respect, I entirely fail to see how, as observed by Shephard, J., in *Vallabha Valiya Rajah v. Vedapuratti*(2), this can be regarded as giving a "qualified support" to the decisions of this Court in *Sami v. Somasundram*(3), *Periandi v. Angappa*(1), *Karuthasami v. Jaganatha*(4), *Ramunni v. Brahma Dattan*(5). The above decision of the Privy Council was also referred to in *Nainappa Chetti v. Chidambaram Chetti*(6) and *Raja Ram Singhji v. Chunni Lal*(7) and regarded as expressing neither approval nor disapproval of the decision of this Court in *Periandi v. Angappa*(1) which alone was cited before the Privy Council.

The other Privy Council decision is that of *Sri Rajah Papamma Rao Bahadur v. Sri Vira Pratapa Korkonda*(8). In that case, the condition of the mortgage was "if the debt is not discharged according to instalments, you (mortgagee) should recover the same by means of the mortgaged property, the crops of our cultivation and from our other property and from our person according to your wish." The first suit was brought by the mortgagee as plaintiff, for a decree directing the defendants (mortgagors) to pay the amount then due with subsequent interest

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(1) I L R., 7 Mad., 423

(3) I L R., 6 Mad., 119.

(5) I L R., 15 Mad., 366

(7) I L R., 19 All., 205.

(2) I L R., 19 Mad., 40 at p. 51

(4) I L R., 8 Mad., 478

(6) I L R., 21 Mad., 18 at p. 24

(8) L.R., 23 I.A., 32, I L R., 19 Mad., 249.

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"by means of the undermentioned property and other property."

The decree in the first suit was in these terms:—"In accordance with the custom prevailing in the Courts in this Presidency, three months' time will be allowed to the defendants within which to pay up the whole sum now decreed, principal, interest and costs; failing which the plaintiff shall be put in possession of the immovable and moveable property specified in the bond sued upon and in the plaint and schedule, as provided in the terms of the bond." The mortgagor subsequently brought a suit for an account, alleging that the whole mortgage debt has been discharged by the rents and profits received by the mortgagees and that the mortgagors were entitled to restitution of the property. The mortgagees resisted the suit by contending that the decree in the former suit operated as a foreclosure of the mortgage and that the village had become absolutely their property in virtue of that decree. Their Lordships held that the decree was not according to law, but not having been set right either by way of review or on appeal, was binding on the parties and that there being nothing in the judgment to suggest a foreclosure any more than usufructuary possession, the mortgagee—who was originally a simple mortgagee—must be regarded as having become, under the decree, mortgagee in possession and as such he must submit to be redeemed. The principle of this decision is that the former decree has been fully executed by the mortgagee recovering possession of the mortgaged property from the mortgagors; but that such possession being only in his character as mortgagee is liable to be redeemed as from a usufructuary mortgagee and that can be effected only by a new suit, not in execution of the former decree. It would be just the same as if a simple mortgagee, who was entitled to get possession as usufructuary mortgagee in default of payment on the date stipulated in the mortgage bond, brought a suit against the mortgagor for such possession and recovered the same in execution of a decree passed in such suit. He will then stand in the position of a usufructuary mortgagee and can be redeemed only by a fresh suit.

Neither of the above decisions of the Privy Council can be regarded as throwing any light upon the question now under consideration.

Apart from the Duchess of Kingston's case and other leading cases expounding the general principles of *res judicata* and their

application to particular cases, there is hardly any English authority bearing directly upon the particular question now under consideration. *Marshall v. Shrewsbury*(1), which was cited and relied upon on both sides, throws very little light upon the question. James, L.J., observed that the dismissal of a bill for redemption operates as a decree for foreclosure because the mortgagor cannot afterwards file another bill for the same purpose. "He is not allowed thus to harass the mortgagee."

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A mortgagor bringing a second suit for redemption can hardly arise in England unless the former suit was dismissed for want of prosecution. *Curtis v. Holcombe*(2) referred to by Strachey, C.J., in *Dondh Bahadur Rai v. Tek Narain Rai*(3) has no resemblance whatever to the present case. In that case, the first suit *Teulon v. Curtis*(4) was brought by the mortgagee for foreclosure, but it was held, on the construction of the mortgage-deed, that it was a Welsh mortgage (corresponding to the usufructuary mortgage, under the Transfer of Property Act) and that therefore there could be no right of foreclosure and the suit was accordingly dismissed. Subsequently the mortgagor brought a suit for redemption against Holcombe, the assignee of the original mortgagee (Teulon), and the defendant contended that as he had not been permitted to foreclose, the plaintiff ought not afterwards to be allowed to redeem. The Master of Rolls overruled the contention and held that the plaintiff was entitled to redeem although the defendant had no right to foreclose, but that after having obtained a decree for redemption, if he did not redeem, he must be foreclosed of his right of redemption and the bill should stand dismissed in default of redemption. Under section 42 of the Transfer of Property Act there could be no decree for foreclosure in default of redemption of a usufructuary mortgage, but a decree for sale will be passed in case of default.

Respondent's Counsel was able to rely only upon a general statement made in Daniell's 'Chancery Practice,' page 481, Fisher on 'Mortgages,' paragraph 1385, and Robbins on 'Mortgages,' page 1042, that a decree for foreclosure in itself, not followed by the order of foreclosure absolute, is not a good

(1) L.R., 10 Ch. App., 250.

(2) 6 L.J. (N.S.), Ch., 156; 34 B.R., 305.

(3) I.L.R., 21 All., 251 at p. 256.

(4) Younge, 610-620; 2 L.J. (N.S.) Eq., 17; 34 B.R., 301.

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defence to an action to redeem. At page 869, Robbins on 'Mortgages,' it is also stated that a mortgagee may, after decree for redemption, bring a suit for foreclosure, unless it is done merely to accumulate expenses. The authority relied upon by the said text-writers in support of these propositions is certainly very slender, if not shadowy. The latter proposition is directly opposed to section 67 of the Transfer of Property Act which provides that a mortgagee can enforce the mortgage by foreclosure only before a decree has been made for redemption of the mortgage; and I do not pause to examine the authorities cited by Robbins (*Shepherd v. Titley*(1), *Grugeon v. Gerrerd*(2), *Dunstan v. Patterson*(3)), and the Chancery Practice obtaining at the time of those decisions, and determine how far they support the proposition. The principal authority cited by the three text-writers in support of the first proposition is the case of *Senhouse v. Earle*(4), which in its first stage is reported in 2 Ves. Sen., 450, and in its later stage in Ambl. 285. The bill (filed in 1752) was for redemption, and in overruling a plea in bar, Hardwicke, L.C., said that "he remembered a case of this sort, *Jones v. Kenrick* where to a bill of redemption there was a plea of decree for foreclosure in the common form, with averment of non-payment of the money, etc., but no final order for foreclosure, and it was an old decree; but notwithstanding that, Lord King allowed it. From which he knew there was an appeal; and (though it was said at the bar to be compromised) he took it to be reversed; for it was apprehended to be wrong; as, notwithstanding such plea and length of time may be a good defence, yet as a plea it could not stand for want of a final order." In dismissing the bill on the merits on another point (*Senhouse v. Earle*(4)), the Lord Chancellor adverting again to *Kenrick v. Jones*, observed that there was no final order for foreclosure and therefore it was insisted that the redemption was open, but it appearing that at the time of obtaining that foreclosure it was not the course of the Court to have such final order the objection was overruled. The Lord Chancellor's recollection of *Kenrick v. Jones* (which is apparently nowhere reported) in 1752 was that the decision of the original

(1) 2 Atk., 348

(3) 2 Ph., 341.

(2) 4 Y. & C, 119 at p. 128.

(4) 2 Ves. Sen., 450; Ambl., 285.

Court allowing the plea of decree for foreclosure in the common form with no final order for foreclosure as a valid plea to a bill for redemption must be taken to have been reversed in appeal, though it was said at the bar that the appeal was compromised; but in 1755 he justified the decision of the lower Court on the ground that the decree of foreclosure in the common form would itself operate as a bar, as it was not the course of the Court at that time to have a final order of foreclosure.

* The case of *Senhouse v. Earle*(1) is not cited in Chitty's 'Equity Index' or Mow's 'Digest' as an authority for the proposition deduced therefrom by the above text-writers, but for quite a different proposition, which was the ground on which the bill was finally dismissed on the merits. Whether the bill in *Senhouse v. Earle*(1) was an original bill, or a supplemental bill in addition to or a continuance of or a dependency of the original bill, or one brought for the purpose of cross-litigation or of controverting, or of carrying a decree of Court into execution (Story's 'Equity Pleadings,' paragraphs 16 to 21) is more than I can say, nor can I say, having regard to the fact that the defendant in the original bill was the plaintiff in the subsequent bill, how far the law of *res judicata* had developed at that time, about twenty years prior to the Duchess of Kingston's case.

In Daniell's 'Chancery Practice' the only case cited is *Senhouse v. Earle*(1). But Fisher also cites *Quarrell v. Beckford*(2) and Robbins, *Ford v. Wastell*(3). But it is not clear whether these two cases are cited in support of the proposition or simply as having an indirect bearing thereon. In the latter case, all that was laid down was that even after the enrolment of the order of foreclosure absolute, the time may be enlarged. As far as I am able to understand the former case, it really has no bearing whatever upon the proposition that the foreclosure cannot be pleaded as a bar to an action to redeem unless there has been a final order of foreclosure.

The above review of the decisions directly bearing or supposed to bear upon the question immediately under consideration establishes that the preponderance of case-law is decidedly against

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(1) 2 Ves. Sen. 450, Ambli., 285.

(2) 1 Mad., 269; 13 Ves., 377.

(3) 2 Ph., 591.

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the view taken by this Court and that the assumption that that view is in conformity with the English law rests only upon the antiquated and very slender basis of *Senhouse v. Earle*(1), the proposition deduced from which is itself opposed to the earlier unreported case of *Kennick v. Jones* (cited from memory and explained therein by the Lord Chancellor) and in particular to the fundamental doctrine of *res judicata* as long established under the English system of jurisprudence and recognized and acted upon since the Duchess of Kingston's case both in England and in India.

BENSON, J.—I would answer the reference in the negative for the reasons stated by the learned Chief Justice and Sir Bhashyam Ayyangar, J., whose judgments I have had the advantage of perusing.

MOORE, J.—The predecessor in title of the present plaintiff brought in 1889 a suit to redeem a mortgage of 1858. The case was decided after a hearing on the merits by the Subordinate Judge and his decree was confirmed on appeal by the District Judge and the High Court. Under this decree it was directed that on payment by the plaintiff into Court of a certain sum on or before a fixed date the defendants should deliver up to him all documents relating to the mortgaged property and retransfer the property to him, and that if such payment was not made on or before the date fixed, the property should be sold. The plaintiff did not pay within the prescribed date, and the defendants did not apply under section 93 of the Transfer of Property Act for an order for sale. The plaintiff, after the date fixed had expired, paid the money into Court and the Subordinate Judge directed the defendants to receive it and put the plaintiff in possession of the mortgaged property. In the application for execution which the plaintiff filed requesting that the money should be received from him, he gave no explanation for his delay and did not apply for an extension of the time allowed by the decree for payment. Subsequently the thirty-first defendant in the suit put in a petition asserting that as the plaintiff had not paid the amount entered in the decree within the time there fixed, he had lost his right to execute the decree and praying therefore that redelivery of the property might be ordered. The Subordinate Judge held that

(1) 2 Ves. Sen., 450; Amb1., 285.

under the decision in *Kanara Kurup v. Govinda Kurup*(1) as long as the mortgagee abstained from obtaining an order for sale under section 93 of the Transfer of Property Act, the mortgagor's equity of redemption subsisted. He accordingly dismissed the petition. On appeal, however, the District Judge reversed the decision of the Subordinate Judge, and this appellate order was upheld by the High Court in the judgment in *Vallabha Valiya Rajah v. Vedapuratti*(2). The result of these proceedings was that the plaintiff was ousted from possession of the mortgaged property, and he subsequently, in 1897, filed the suit which has led to the present reference in which he, on the same cause of action as that on which the prior suit had been based, sued a second time to redeem the mortgage of 1858. The facts being as I have stated, there appears to me to be no doubt that the reference which has been made to us must be answered in the negative and that it must be held that it was not open to the plaintiff to bring the present suit. The provisions of section 13 of the Civil Procedure Code are, in my opinion, a bar to this suit, and the learned Counsel for the plaintiff has in his argument before us scarcely attempted to show that the questions at issue are not *res judicata*. His main argument has been that as the relation of mortgagor and mortgagee still subsists between the plaintiff and the defendants it must be held that it is open to the former to bring the present suit for redemption. The following passage from the judgment of the High Court in *Karuthasami v. Jaganatha*(3) is relied on:— "In our judgment the relation on which the mortgagor and mortgagee stood to one another was not terminated by the decree. It was intended by the decree that it should be terminated on the happening of a certain event which event has not occurred. The relation then still exists and the right to redeem is inseparable from the relation so long as it exists." There can, of course, be no doubt as to the correctness of the proposition of law here laid down, but it cannot be held that it therefore follows that a plaintiff, who obtained a decree for redemption which he has failed to execute, can bring a second suit on the same cause of action. His remedy is to execute the decree that he has already obtained, and it clearly is illogical to argue that if for any reason that decree has ceased to be

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(1) I.L.R., 16 Mad., 214.

(2) I.L.R., 19 Mad., 40.

(3) I.L.R., 8 Mad., 478.

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executable the plaintiff can evade the bar under the provisions of section 13 of the Civil Procedure Code and bring a fresh suit. The question has not been argued before us, but as far as I can judge from the record, it appears that it is still open to the plaintiff to execute the decree of 1890. The only point that was decided in the judgment in *Vallabha Valiya Rajah v. Vedapuratti*(1) was that the plaintiff having made default in payment of the mortgage money within the time fixed by the decree was not entitled to apply for execution. This decision was no doubt correct, but it does not therefore follow that the decree was incapable of execution. It was clearly open to the plaintiff to apply under the last clause of section 93 of the Transfer of Property Act for an extension of the time allowed to him for payment, and if he was able to show good cause for his application the Court would have been bound to grant him the extension of time asked for. The ruling of the Bombay High Court in *Nandram v. Babaji*(2), as to this matter is, in my opinion, correct and should be followed.

We should, I consider, answer the reference made to us in the negative.

This case coming on for final disposal after the expression of opinion of the Full Bench, the Court (BHASHYAM AYYANGAR and MOORE, JJ.) delivered the following

JUDGMENT.—Following the opinion of the Full Bench in the reference made to it, we must allow this appeal and hold that this suit was not maintainable. We reverse the decrees of both the lower Courts and dismiss the suit. The parties will have to pay their own costs throughout.

(1) I.L.R., 19 Mad., 40.

(2) I.L.R., 22 Bom., 771.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Davies.

SANKARANARAYANA VADHYAR (PLAINTIFF), APPELLANT,

v.

SANKARANARAYANA AYYAR (DEFENDANT), RESPONDENT.*

1901.
November
6, 7, 14.

Usury Laws Repeal Act—Act XXVIII of 1855, s. 2—Contract Act—Act IX of 1872, s. 74—Contract Act Amendment Act—Act VI of 1899, s. 4—Penalty—Principal sum bearing no interest repayable by instalments—Provision for interest in case of default.

Defendant was indebted to plaintiff, as the stake-holder of a "chit fund," and undertook to pay the amount of the principal by half-yearly instalments. He further undertook that, in case of default in the payment of such instalments, he would pay interest at the rate of one pie per rupee per diem from the date of default. No interest was payable on the principal sum unless default should be made, the instalments being in repayment of the principal sum alone without interest. Default having been made, plaintiff sued on the bond, whereupon defendant pleaded that the rate of interest was penal and not recoverable:

Held, that plaintiff was entitled to recover. The contract was not one which provided for the payment of a given rate of interest in any event and a higher rate in case of default. Under the agreement the debtor incurred no obligation to pay interest at all on the money which he owed. His liability to pay interest only arose in the event of default. The case was not governed, therefore, by the Contract Act of 1872, or the Contract Act Amendment Act of 1899.

Per Sir ARNOLD WHITE, C.J.—Under the Contract Act of 1872, a stipulation that an enhanced rate of interest should be payable as from the date of default is not a stipulation by way of penalty. The explanation to section 4 of the Contract Act of 1899, which provides that a Court may treat such a stipulation as a penalty, is permissive and does not preclude it from holding otherwise.

Semble, that the words "which is put in issue" in section 4 of the Contract Act of 1899, mean "which is in issue" and that where there is an appeal from a decree in a suit instituted in respect of a contract the contract is "in issue" in the appeal. Also, that the Contract Act of 1899 only applies to suits instituted after the commencement of that Act.

SUIT to recover Rs. 2,500 due under a mortgage bond. Plaintiff was the stake-holder in a lottery. Defendant was a subscriber, and held $1\frac{1}{4}$ tickets. He received the amount of prizes in respect of these tickets at the seventh and eighth drawings. He was, in

* Second Appeal No. 332 of 1900 against the decree of B. Cammaran Nayar, Additional Subordinate Judge of Tinnevely, in Appeal Suit No. 191 of 1899, modifying the decree of A. Ramalingam Pillai, District Munsif of Ambasamudram, in Original Suit No. 18 of 1898.

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consequence, bound to pay Rs. 750 to plaintiff. By a bond, executed on 6th December 1894, defendant covenanted to pay this sum in twelve instalments of Rs. 62-8-0 each on 17th May and 19th November of each year, the first instalment to be payable on 17th May 1895. The bond (which was filed as exhibit A) also contained the following covenant:— "And in default, I bind myself to pay on demand in a lump sum, without reference to the subsequent instalments, the principal sum and the accrued interest at the rate of one pie per diem for every rupee of the total amount which I should pay from the date of default to the close of chit, deducting the amount paid by me till then."

Default was made, and plaintiff became entitled, according to the terms of the bond, to the principal sum of Rs. 750, and also to interest thereon, from 18th May 1895 to 17th December 1897, which amounted to Rs. 4,618-7-6. Plaintiff, however, gave credit for Rs. 150, (a sum to which defendant was entitled), and, as the amount of interest was large, confined his claim to Rs. 2,500 in all, which was the pecuniary limit of the Munsif's jurisdiction.

Defendant admitted the bond, and pleaded failure of a portion of the consideration, and that the rate of interest was illegal.

The District Munsif decreed in plaintiff's favour for the amount claimed.

The Subordinate Judge, on appeal, held that the rate of interest, amounting as it did to 180 per cent. per annum, was out of all proportion to the risk and beyond all measure of damages from failure to pay the instalments. He allowed plaintiff interest at the rate of 12 per cent, as a reasonable rate in compensation for the default.

Plaintiff preferred this second appeal.

V. Krishnasami Ayyar and Sivarama Ayyar for appellant.

Ramakrishna Ayyar for respondent.

The Court delivered the following judgments:—

Sir ARNOLD WHITE, C.J.—In this case the defendant was indebted to the stake-holder of a chit fund in a sum of Rs. 750. He undertook to pay this sum by half-yearly instalments of Rs. 62-8-0 and in default he bound himself to pay in a lump sum on demand the principal debt and interest at the rate of 1 pie per diem per rupee from the date of default. The half-yearly instalments of Rs. 62-8-0, which the defendant undertook to pay, were on account of principal only. There is some conflict of

authority with reference to the enforcement of stipulations which provide for the payment of a higher rate of interest on default. but the authorities appear to be uniform at any rate to this extent—that when the higher rate of interest is payable as from the date of default and not as from the date of the contract, the contract rate is enforceable. See *Arulu Mustry v. Wakuthu Chinnayan*(1), *Nanjappa v. Nanjappa*(2), the judgment of this Court (Shephard, J. and Davies, J) in *Krishnasami Ayyar v. Samu Ayyar*(3), *Dullabhdas Devchandshet v. Lakshmandas Swarupchand*(4), *Umarkhan Mahamadkhan Deshmukh v. Salekhan*(5), *Mackintosh v. Crow*(6), and *Deno Nath Santh v. Nibaran Chandra Chuckerbutty*(7). The result of the authorities is thus stated by Sargent, C. J, in *Umarkhan Mahamadkhan Deshmukh v. Salekhan*(5) —“a proviso for retrospective enhancement of interest in default of payment of the interest at due date is generally a penalty which should be relieved against, but a proviso for enhanced interest in the future cannot be considered as a penalty, unless the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties.” As pointed out by this Court in the case of *Nanjappa v. Nanjappa*,(2) when the agreement is to pay the higher rate as from the date of default no question of penalty really arises. At the moment of the breach no larger sum can be exacted by the creditor, but from the date of the breach the terms on which the debtor holds the money become less favourable. “By the default he accepts the alternative arrangement of paying a higher rate of interest for the future. On the other hand when the stipulation is that on default the higher rate shall be payable from the date of the original obligation, the debtor does on default become immediately liable for a larger sum.” The decisions in the cases in which the Courts have gone further and, following the decision of the Privy Council in *Rai Balkishen Dass v. Raja Run Bahadoor Singh*(8), have held that the contract rate is enforceable even where the higher rate is payable as from the date of the agreement (see for instance

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(1) 2 M.H.C.R., 205.

(2) I.L.R., 12 Mad., 161, at p. 166

(3) Second Appeal No. 1303 of 1896 (unreported)

(4) I.L.R., 14 Bom., 200.

(5) I.L.R., 17 Bom., 106, at p. 113.

(6) I.L.R., 9 Calc., 689.

(7) I.L.R., 27 Calc., 421.

(8) L.R., 10 I.A., 162, I.L.R., 10 Calc., 305.

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Basavayya v. Subbarazu(1), *Narayanasami Naidu v. Narayana Rao*(2), *Arjan Bibi v. Asgar Ali Chowdhuri*(3), *Banwari Das v. Muhammad Mashiat*(4), and *Banke Behari v. Sunder Lal*(5)), do not of course conflict with this view.

It seems to me both on principle and on authority that, as the law stood under the Act of 1872, when the enhanced rate of interest only becomes payable as from the date of default, the stipulation ought not to be construed as a stipulation by way of penalty and the debtor ought not to be relieved therefrom. The mere fact that the rate of interest which the debtor agrees to pay is high, or even exorbitant, is, in itself, of course no reason for relieving him from his bargain, although it may be evidence that the parties were not dealing at arm's length and that some unfair advantage was taken by the creditor—in other words, that there was no real contract between the parties. In the present case, however, having regard to the relations between the parties and the circumstances in which the defendant undertook the obligation which he failed to fulfil. I am certainly not prepared to say that the rate of interest was exorbitant.

Moreover, in the present case it is to be observed that the contract was not one which provided for the payment of a given rate of interest in any event and a higher rate in the event of default. Under the agreement the debtor incurred no obligation to pay interest at all on the money which he owed. His liability to pay interest only arose in the event of default. It seems to me that, if the principle on which the Courts have drawn a distinction between agreements under which a higher rate of interest is payable as from the date of default and agreements under which a higher rate is payable as from the date of the agreement, is sound, as I think it is, the principle applies *a fortiori* where the creditor may be said to waive his right to interest so long as the debtor fulfils his obligation and where the liability to pay interest at all only arises as from the date when the debtor fails to fulfil his obligation.

So much for the law as it stood under the Act of 1872. The next question for consideration is—assuming the amending Act of

(1) I.L.R., 11 Mad., 291

(3) I.L.R., 18 Cal., 200.

(5) I.L.R., 15 All., 232,

(2) I.L.R., 17 Mad., 62.

(4) I.L.R., 9 All., 690.

1899 applies, is the defendant entitled, under section 4 of the Act, to be relieved from his contractual obligation?

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As regards the enacting portion of the section, the alterations would seem to be merely verbal. The explanation, however, declares that a stipulation for increased interest from the date of default may be a stipulation by way of penalty. The explanation appears to be intended to meet the decisions to which I have referred. It is to be observed, however, that the explanation only says that the stipulation may be a stipulation by way of penalty. There is nothing in the explanation to preclude a Court from holding that, notwithstanding that the stipulation was for increased interest from the date of default and not from the date of agreement, the stipulation ought not to be regarded as a stipulation by way of penalty. Further, the explanation does not apply to the contract in the present case, where the stipulation was not for increased interest on default, but for interest on default, no interest being payable if there was no default. None of the new illustrations cover the present case, but there is nothing in any of the illustrations which conflicts with the view indicated above. Putting the proposition of law in the form of an illustration it would run thus:—A undertakes to repay B a loan of Rs. 1,000 by five equal monthly instalments, with a stipulation that, in default of payment of any instalment, the whole shall become due, with interest from the date of default. The fact that interest is payable from the date of default does not, in itself, render the stipulation one by way of penalty.

It seems to me, therefore, that as a question of construction, section 4 of the Act of 1899 would not preclude a Court from holding that the stipulation in the contract in question is not a stipulation by way of penalty.

If the view, expressed above, is right, the question whether, on the construction of section 1 (3) of the Act of 1899, the Act applies at all to the contract in the present case, would not arise. This question of construction, however, has been fully argued, and I propose to deal with it. The Act came into operation on 1st May 1899. The decree of the Court of First Instance (which gave the plaintiff interest at the contract rate) was before the Act came into operation. The decree of the lower Appellate Court, which gave the plaintiff interest at the rate of 12 per cent. only, was

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after the Act came into operation. Section 1 (3) of the Act of 1899 provides that the Act shall apply to every contract in respect of which any suit is instituted, or which is put in issue in any suit, after the commencement of the Act. The question, therefore, turns on the construction of the words "or which is put in issue in any suit."

The contention on behalf of the defendant was that the words "put in issue" were not intended to be used in any technical sense and that the word "suit" included "appeal." On behalf of the plaintiff it was argued that the word "suit" as first used in the sub section obviously meant suit in the restricted sense and that it should be so construed when it is used in connection with the words "put in issue." In the view I take of the construction of the section it is not necessary to deal with these points. If it were I should be disposed to say that the words "which is put in issue" mean nothing more than "which is in issue" and that where there is an appeal from a decree in a suit instituted in respect of a contract the contract is "in issue" in the appeal. It seems to me, however, that the words "put in issue" in any suit mean put in issue in any suit instituted after the commencement of the Act. I concede that this intention could have been made clear beyond all doubt by the introduction of the word "instituted" after the words "in any suit," and that the construction which I am prepared to adopt is not the strict grammatical construction of the sub-section. It seems to me, however, that to construe it otherwise would lead to serious inconveniences and anomalies and that, having regard to the general scope of the amendments made by the Act and the canons of construction in cases where vested rights are affected or the legal character of past transactions is concerned, the Act should be construed as applying only to suits instituted after the commencement of the Act. I think the words "or which is put in issue in any suit" were intended to apply to cases where, although the suit is not instituted in respect of the contract, the contract is put in issue in the suit. The words "contract in respect of which any suit is instituted" apply to cases where a suit is brought to enforce a contract or to have a contract set aside. The words "contract . . . which is put in issue" apply to cases where it becomes necessary for the Court to adjudicate upon a contract, although the suit was not brought either to enforce it or to have it set aside.

I think this appeal should be allowed with costs here and in the lower Appellate Court, the decree of the lower Appellate Court set aside, and that of the District Munsif restored. The plaintiff is entitled to interest at the contract rate on the principal debt Rs. 600 from the date of the plaint until the date of the Munsif's decree and interest at the rate of 6 per cent. from the date of the Munsif's decree until payment.

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DAVIES, J.—The defendant was under an obligation to pay Rs. 750 in half-yearly instalments of Rs. 62½ to a benefit fund and he executed a bond to the plaintiff who was managing the fund to make payment accordingly. In default of the payment of the instalments on the due dates, he stipulated that the whole principal should become payable at once and that he would pay interest on the instalments in case of non-payment on the fixed dates at the rate of 1 pie per diem per rupee.

The only question before us is whether the interest so agreed upon is recoverable in full as the contract rate between the parties, under section 2 of Act XXVIII of 1855, which provides that "in any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties" or whether that rate, being a very high one—amounting as it does to about 180 per cent. per annum—ought to be relieved against as a penalty, and only a lower rate allowed. The contract rate was allowed by the District Munsif, but the Subordinate Judge, in appeal, holding that rate to be exorbitant, decreed at the rate of only 12 per cent. per annum. Hence this second appeal by the plaintiff, whose pleader points out that in an exactly similar case in the same Munsif's Court, a Division Bench of this Court in *Krishnasami Ayyar v. Samu Ayyar*(1), decided in favour of the contract rate. There is no question here, nor was there in the second appeal just referred to, as to the contract being voidable on the ground of the defendant not understanding the transaction. He entered into it with free consent and the parties were on an equal footing. Section 74 of the Contract Act, and the numerous and various decisions of the High Courts in India in regard to the provision in a contract for an increased rate of interest when there is a default in payment of a lower rate, are also, in my opinion, inapplicable to this case, inasmuch as no

(1) Second Appeal No. 1303 of 1896 (unreported).

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increased rate of interest is here stipulated for. The agreement simply was that interest was to be paid on overdue instalments, and the rate of such interest was once for all fixed. So what the respondent's pleader mainly relies on is a ruling of the Allahabad High Court that when an extravagant rate of interest is provided for it is only equitable to hold that "interest" was not intended to mean "interest" but a penalty—in other words, that though nominally interest, it was really penalty (*Bansidhar v. Bu Ali Khan*(1)). But I am unable to agree in this view. When persons make an engagement with their eyes open they should be bound by it: although to the Court the bargain may appear extortionate it may in reality not be so. It is impossible for the Court always to know what are the considerations weighing between parties when they come to an agreement, especially in money matters. The urgency of the demand, and the scarcity of the supply, would often operate to increase the cost—or in this case the fund might itself have had to pay for the money it required to enable it to be carried on an exorbitant rate of interest, if the defendant failed to keep up to his engagement. So that when the intention of the parties is plain and unmistakable as it is here, that intention must be given effect to. In accordance with this view it was held in *Appu Rao v. Suryanarayana*(2) that the mere fact that the terms are exorbitant is of itself no reason for not enforcing a contract duly made, and on the same principle in *Arjan Bibi v. Asgur Ali Chowdhuri*(3) a rate of interest almost as high as that in the present case, namely, 2 annas per rupee per month, was decreed. I am therefore clearly of opinion that the decision in *Krishnasami Ayyar v. Samu Ayyar*(4) was right, and following it, I would reverse the decree of the lower Appellate Court and restore that of the Munsif, plus the further interest awarded in the judgment of the learned Chief Justice. The respondent must pay the appellant's costs in this and in the lower Appellate Court.

(1) I.L.R., 3 All., 209.

(2) I.L.R., 10 Mad., 203.

(3) I.L.R., 13 Cal., 200

(4) Second Appeal No. 1303 of 1896 (unreported).

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

AKKANNA AND ANOTHER (DEFENDANTS NOS. 3 AND 24),
APPELLANTS,

1901.
December 3,
4, 10.

v.

VENKAYYA AND OTHERS (PLAINTIFFS, DEFENDANTS NOS. 1 AND 2,
AND LEGAL REPRESENTATIVES OF DEFENDANT NO. 4 AND
PLAINTIFF NO. 5 RESPECTIVELY), RESPONDENTS.*

Hindu Law—Property inherited by widow from her husband—Acquisitions with the income thereof—No indication of intention by widow to make the acquired property part of the husband's estate for the benefit of his heirs. Presumption that widow intended to retain control

A Hindu widow inherited certain property from her husband and with the income thereof required land on a usufructuary mortgage for 52 years. She assigned the unexpired portion of the term of the mortgage for consideration, and subsequently died. The reversionary heirs to her late husband then sued her assignees for the property. There was no evidence that the widow had ever indicated any intention to make the property part of her husband's estate for the benefit of his heirs.

Held, that there was no presumption that the widow intended to part with her power of disposition for the benefit of her reversionary heirs. The acquirer of property presumably intends to retain dominion over it, and in the case of a Hindu widow the presumption is none the less so when the fund with which the property is acquired is one which, though derived from her husband's property, was at her absolute disposal. Inasmuch as the widow's absolute power of disposition over the income derived from the widow's estate, is now fully recognized, she will be presumed, in the absence of an indication of her intention to the contrary, to retain the same control over the investment of such income. Nor is that presumption affected by the fact that properties thus acquired by her are managed and enjoyed by her without any distinction, with properties inherited from her husband. She is the sole and separate owner of the two sets of properties, so long as she enjoys them, and is absolutely entitled to the income from both.

The title of the assignees of the widow was upheld.

Isri Dut Koer v. Hansbutti Koerain, (I.L.R., 10 Calc., 321 at p. 337: s.c. sub nom. *Isri Dut Koer v. Mussumut Hansbutti Koerain*, I.L.R., 10, I.A., 150), and *Sadaminis Dasi v. The Administrator-General of Bengal*, (I.L.R., 20 I.A., 12; I.L.R., 20 Calc., 433), referred to.

SUIT to recover plaintiffs five-ninths share of certain property together with past and subsequent profits. The plaintiffs alleged

* Appeal No. 170 of 1900 against the decree of J. H. Munro, District Judge of Górávari, in Original Suit No. 4 of 1899.

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that their father, the late Timmanna, the late Dorayya, (*alias* Raghunayakulu), father of defendants Nos. 1 to 4 and grandfather of fifth and sixth defendants, and the late Venkatarayudu, (father of one Bulli Venkanna), were brothers; that Bulli Venkanna died issueless about 36 years ago; that after the death of Bulli Venkanna, his widow Parvatamma inherited the property mentioned in the plaint schedule and enjoyed it up to her death, which took place on 5th October 1897; that Parvatamma sent money to a Muhammadan and obtained a usufructuary lease of acres 25-99 cents of inam land for 52 years from 1864-65 to 1915-16; that after the death of Parvatamma the plaintiffs and defendants Nos. 1 to 4 were heirs to the properties of the late Bulli Venkanna; that Parvatamma fraudulently alienated the properties in question to the defendants; that the said alienations are invalid, and that the defendants had no right to the property in dispute. The defendants Nos. 3, 16, 17, 18, and 24 stated that the late Parvatamma never enjoyed the lands alleged to have been taken by her on usufructuary mortgage; that Parvatamma inherited no property from her husband; that the money said to have been lent to a Muhammadan was not her husband's property; that even if it should be held that Parvatamma obtained a usufructuary mortgage deed, the original owners, before the death of Parvatamma, had sold, in 1893, acres 6-15 cents of land to third defendant, and acres 2-22 cents of land to twenty-fourth defendant; that the third and twenty-fourth defendants *bonâ fide* paid the money and purchased the said lands and had been enjoying them as of right; that the late Parvatamma alienated no property to them improperly and without consideration; that plaintiffs had no right whatever to question the alienations alleged to have been made by Parvatamma in respect of the said inam lands and that neither the pati site nor the jirayati lands mentioned in the schedule were in their possession.

The following issues among others were framed :—(i) Were the suit zamindari jirayati lands inherited, and enjoyed by Bulli Venkanna, and afterwards by Parvatamma, as alleged in paragraph 3 of the plaint? (ii) Were all or any of the said jirayati lands, alienated in favour of any of the defendants as alleged by the plaintiffs? (iii) Did the late Parvatamma obtain a mortgage from the person mentioned in the plaint with the money inherited from her husband,—what are the terms of the said

mortgage? (iv) Did the late Parvatamma obtain possession of any portion of the mortgaged properties under the terms of the said mortgage bond? (v) If any mortgage bond was executed in favour of the late Parvatamma as alleged in the plaint are the plaintiffs entitled to its benefit? (vi) Did the late Parvatamma alienate the lands as contended by the plaintiffs in favour of the defendants Nos. 2 to 18 and are the said defendants in possession of the said lands? (vii) Did Venkatarayudu predecease Bulli Venkanna? (viii) Is any portion of the plaintiff's claim barred by limitation? (ix) Did the late Parvatamma convey the whole of the house-site included in the suit to the first defendant and is the alienation made by the late Parvatamma valid and binding on plaintiffs and defendants Nos. 2, 3, and 4?

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Dealing with issues Nos 3 to 6 the District Judge said.— 'The evidence discloses that Parvatamma had only 8 acres of inam in Nos. 518 and 522 on mortgage; of this—the third defendant has approximately 6 acres and twenty-fourth defendant 2 acres. The defendants claim under exhibits IV and V. sale-deeds by the mortgagors, dated 20th March 1893. The mortgage is stated to be a usufructuary mortgage for 52 years from fash 1274, and by exhibit K, Parvatamma transferred her interest to Ramayya. The evidence shows sufficiently that Parvatamma did get a mortgage as alleged. It is plaintiff's case that the money advanced by her was money inherited from her husband. That she inherited any money from her husband cannot be said to be proved. It is argued however that the money must at any rate have been money derived from her husband's property and that it was clearly Parvatamma's intention to treat the mortgage as an accretion to her husband's property. *Isri Dut Koer v. Mussunut Hansbutti Koeram*(1), and *Babu Sheo Lochun Singh v. Babu Saheb Singh*(2), are relied upon and support the argument. It has been found that Parvatamma did inherit some property from her husband, and it has not been shown that she had any property not so inherited. It may be taken, therefore, that the money advanced was derived from her husband's property. There is nothing to show that Parvatamma made any distinction between the lands held on mortgage and the jirayati lands. On the other hand, the recitals in

(1) L R, 10 I.A., 150, I.L.R., 10 Calc., 324.

(2) L R., 14 I.A., 63, I.L.R., 14 Calc., 387.

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exhibit K, that Parvatamma was living on her husband's property, and that the transfer was made to discharge her debts are indications of how she looked upon the property. No valid necessity for the transfer under exhibit K, has been proved, and the alienation is therefore not valid after Parvatamma's death and the reversioners are entitled to the benefit of the mortgage. The sale deeds obtained by defendants Nos. 3 and 21 from the mortgagors, cannot prevail against the outstanding mortgage. The evidence of the karnam who wrote exhibits IV and V shows that the lands covered by these deeds were the lands transferred under exhibit K to Ramayya. The karnam also states that Parvatamma paid taxes on her inams and there is other oral evidence of her enjoyment. There is no sufficient evidence for the defence to rebut this evidence. I find, therefore, on the third issue, that Parvatamma got a usufructuary mortgage of a portion of Nos. 518 and 522 which mortgage does not expire till 1915-16; on the fourth issue, that she got possession under her mortgage; on the fifth issue, that the plaintiffs are entitled to the benefit of the mortgage; and on the sixth issue, that Parvatamma alienated under exhibit K to the father of defendants Nos. 5 and 6 the mortgaged property, which defendants Nos. 3 and 21 subsequently purchased and of which they appear now to be in possession."

He passed a decree in favour of plaintiffs, for possession of their five-ninths share in a portion of the land as against defendants Nos. 5 to 7, and in the inam lands, till the expiry of the mortgage as against defendants Nos. 3, 11, 12, 13 and 21; and in another portion as against defendants Nos. 1 and 8. In other respects the suit was dismissed.

Defendants Nos. 3 and 24 preferred this appeal.

I. Krishnasami Ayyar for appellants.

Sundara Ayyar and *K. Subrahmanya Sastri* for respondents Nos. 1 to 4.

JUDGMENT.—The main facts are sufficiently stated by the District Judge. This appeal is preferred by defendants Nos. 3 and 24 against so much of the decree as awards to the plaintiffs five-ninths share in certain inam lands, which are partly in the possession of the third defendant and partly in the possession of the twenty-fourth defendant. The District Judge decided the case on the footing that Parvatamma inherited certain property from her husband and with the income thereof acquired the lands in question

in 1864 on a usufructuary mortgage for 52 years from certain Muhammadans who were the owners thereof. The usufruct was to extinguish the debt at the end of the 52 years. The District Judge further held that Parvatamma assigned in 1877 under exhibit K the unexpired portion of the term of the mortgage to Ramayya, the brother of the third defendant, and received a portion of the sum named therein, viz, Rs. 290, as consideration for the assignment

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The questions argued in support of the appeal are (i) that there is no proof that the property in question was acquired on mortgage by Parvatamma or that she alienated the same to the appellants, (ii) that the appellants respectively purchased portions of the property in 1893 from the Mussalman owners from whom they held leases of an earlier date, (iii) that even if the property was so acquired by her and alienated to the appellants, the plaintiffs as reversionary heirs cannot impugn the alienation, and lastly (iv) that Parvatamma's husband Bulli Venkanna predeceased his father, Venkatarayudu, and that therefore she was not entitled to inherit from her father-in-law the property from the income of which the mortgaged property was acquired, and that therefore she acquired an absolute right to such property, not merely a widow's estate. It is unnecessary to consider the question of law raised in the last-mentioned ground of appeal as we fully concur with the District Judge in his finding that Bulli Venkanna did not predecease his father. As regards the proof of the mortgage the instrument is not forthcoming, but, according to exhibit K, it ought to be in the possession of the family of Ramayya, and we think that exhibit K, which is a registered instrument, is sufficient evidence, at any rate against the third defendant, and there is also some oral evidence in proof of the mortgage. Though the assignment, exhibit K, was in the name of Ramayya alone, there is evidence that the lands, or at any rate, the income thereof, was enjoyed in common by Ramayya and his younger brothers the second and third defendants, the eldest brother, first defendant, having become divided from them prior to 1877. Third defendant, no doubt, got a sale deed exhibit IV for the property in his possession from the Mussalman owners in 1893. This sale would confer on him only the equity of redemption of the land, and it may be that his brothers have no right in such equity of redemption, but it is not inconsistent with the plaintiff's case that third defendant was in possession of

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the land as assignee of the mortgage in favour of Parvatamma. There is no proof of third defendant's plea that his possession prior to 1893 was as lessee directly from the Mussalman owners and no cowle is produced in support of the plea. His possession therefore must be traced to the alienation made by Parvatamma under exhibit K and, if Parvatamma had no absolute power of disposal of the lands which she held as mortgagee, it is not contended or established that the alienation under exhibit K was for a purpose binding on the reversioners. As regards the land in the twenty-fourth defendant's possession, we find it difficult to concur with the District Judge either that it was comprised in the moiety of the mortgaged land in respect of which moiety alone Parvatamma's right was established in the suit referred to in exhibit K, or that the twenty-fourth defendant derived his title thereto from the transferee under exhibit K.

The twenty-fourth defendant is not a member of Ramayya's family, and there is evidence that the land had been previously in the enjoyment of his father-in-law. The only evidence is that the land is part of the Mussalman's inam land, but there is nothing to show that it is included in the moiety adjudged to Parvatamma. On this ground, if on no other, it would be necessary to allow the appeal so far as this land is concerned.

As regards the third contention, we are unable to uphold the finding of the District Judge that the property acquired by Parvatamma, on a usufructuary mortgage for a long term of years, by means of the income derived by her from the jirayati lands inherited from her husband, should be held to form an accretion to her husband's estate, and that her alienation of the same does not bind her reversioners. The District Judge, relying upon the decisions of the Privy Council in *Isri Dut Koer v. Mussumut Hansbutti Koeram*(1) and *Babu Sheo Lochun Singh v. Babu Sahab Singh*,(2) holds that it was really Parvatamma's intention to treat the mortgage as an accretion to her husband's property and that there is nothing to show that she made any distinction between the lands acquired by her on mortgage and the jirayati lands inherited by her from her husband. He considers that the recitals made in the transfer deed, exhibit K, that her occupation was

(1) L.R., 10 I.A., 150, I.L.R., 10 Calc., 324 at p. 337.

(2) L.R., 14 I.A., 63; I.L.R., 14 Calc., 387.

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'living on her husband's property' and that she alienated the property for the purpose of discharging her debts, show that she treated the property acquired on mortgage as accretion to her husband's property. The property comprised in the transfer deed is only the mortgage property and there is no recital as to the nature of the debt. The occupation of the executant is generally mentioned in documents as required by the rules of the Registration Department, and the statement in the document that Parvatamma was living on her husband's property cannot possibly warrant an inference that it was her intention that the mortgage property should form an accretion to the husband's estate. In our opinion there is no evidence on the record either to show that Parvatamma intended thus to incorporate her property or to show that she did not intend so to do. The question as to the power of disposition which a Hindu widow has over property acquired by her out of the income from her husband's estate, or out of savings from such income, has to be determined solely with reference to general principles and judicial decisions, there being no texts of Hindu law bearing upon it. Mr. Mayne gives a summary of these decisions in paragraphs 626-630 of his 'Treatise on Hindu Law and Usage,' (sixth edition), and it is unnecessary to refer here to any of the decisions on the subject prior to the decision of the Privy Council in *Isri Dut Koes v Mussumut Hansbutti Koesam* (1) in which all the earlier decisions are reviewed and considered. While laying down clearly in that case that a widow's savings from the income of her husband's estate are not her stridhana, and that, if she made no attempt to dispose of them in her lifetime, it is undisputed that they follow the estate from which they arose, it was held that it was a question to be decided upon the facts of each case whether such savings form an accretion to the husband's estate as distinguished from income held in suspense in the widow's hands, as to which she has not determined whether or not she will spend it. In that case the properties consisted of certain shares of land in which the husband was a shareholder to a large extent, and the purchase was made by the widows out of their savings within a short time after his death in 1857, and they made no attempt to alienate them till 1873, and even then "the object of the alienation was not the need or the personal benefit of the widows, but a desire to

(1) L.R., 10 L.A., 150; I.L.R., 10 Cal., 324 at p. 337.

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change the succession and give the inheritance to the heirs of one of themselves in preference to their husband's heirs." This was carried out by conveying to such heir part of property inherited from the husband and part of property subsequently acquired by the widows. These circumstances in their Lordships' opinion clearly established "accretion to the original estate" and made the after-purchases inalienable by the widows for any purpose which would not justify alienation of the original estate. In *Babu Shoo Lochun Singh v. Babu Sahib Singh*(1) the above decision was followed and it was held that the purchased properties were dealt with by the widows as accretions to their husbands' estate, and that the original properties and such accretions were treated by the widows precisely alike in the deed of gift which they executed in favour of the alleged adopted son. In this case, no doubt, their Lordships observe that "where a widow comes into possession of the property of the husband and receives the income and does not spend it but invests it in the purchase of other property" it must be taken *prima facie* to be the intention of the widow to keep the estate of the husband as an entire estate, and treat the property purchased as an accretion to that estate. This was only a *datum* which must be understood with reference to the facts and circumstances of that case, which, it was held, indicated that it was the intention of the widows to keep the estate entire, and that the same should descend in one line of succession. In *Soodamini Dasi v. The Administrator-General of Bengal*, (2) the latest decision of the Privy Council on the subject, the income which accrued on the estate of the husband for a period of about eight years subsequent to his death and which was not disposed of by his will, came to his widow as his heir at law and she invested the same in Government securities exceeding two lakhs of rupees in value; and after the lapse of about 20 years she disposed of the same as her own. It was held that the money so invested by her belonged to her as income derived from her widow's estate, and was subject to her disposition. With reference to the contention raised in that case that the savings of a Hindu widow must be presumed to have been made for the benefit of her husband's estate, their Lordships observed as follows:—

(1) L.R., 14 I.A., 63, I.L.R., 14 Calc. 387.

(2) L.R., 20 I.A., 12, I.L.R., 20 Calc., 433.

"Without examining the precise result of the decisions, it is sufficient to say that in this case there is no room for any such presumption, for the corpus of the estate never came to the widow, but was taken by Shamcharan Mullick under the will, and the income to which the widow succeeded was separated from it, and became and was dealt with, as an entirely separate fund. . . . She did nothing to indicate an intention to make the fund received or the interest on it, part of her husband's estate, which was in other hands, or to justify the inference that she wished it to revert to her husband's heirs. It was said she had placed it in investments of a permanent nature. Had she done so, it does not appear to their Lordships that this circumstance alone would have added the fund to the estate devolving on her husband's heirs. . . . The fund in question was not in any sense received by Badam Kumari (the widow) as capital or capitalized income of her husband's estate, but was received as income which, under the arrangement with Shamcharan Mullick, was her own absolute property, and she never indicated any intention to make the same part of her husband's estate for the benefit of his heirs."

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In the present case, as already stated, there is no evidence that Parvatamma ever indicated any intention to make the mortgage property part of her husband's estate for the benefit of his heirs. The acquisition made by her out of the income of her husband's estate was not in the nature of an enlargement of that estate or of redeeming the same from an incumbrance or charge or in the nature of an appurtenance thereto; it was simply an investment, on a usufructuary mortgage, of her small savings over which she had absolute power of disposal, and it is difficult to see on what principle it is to be presumed that she thereby intended to part with her power of disposition, for the benefit of her reversionary heirs. The acquirer of property presumably intends to retain dominion over it, and in the case of a Hindu widow the presumption is none the less so when the fund with which the property is acquired is one which, though derived from her husband's property, was at her absolute disposal. In the case of property inherited from the husband, it is not by reason of her intention but by reason of the limited nature of a widow's estate under the Hindu law, that she has only a limited power of disposition. But her absolute power of disposition over the income derived from

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such limited estate being now fully recognized, it is only reasonable that, in the absence of an indication of her intention to the contrary, she must be presumed to retain the same control over the investment of such income. The mere fact that properties thus acquired by her are managed and enjoyed by her without any distinction, along with properties inherited from her husband, can in no way affect this presumption. She is the sole and separate owner of the two sets of properties so long as she enjoys the same, and is absolutely entitled to the income derived from both sets of properties. She cannot but manage and enjoy both sets of properties alike. The case, therefore, is not analogous to that of an undivided member of a Hindu family possessing joint family property, who, by throwing into the common stock the income he derives from his separate or self-acquired property, manifests his intention to impress such self-acquired property with the character of joint family property. Purchasers from a Hindu widow of property acquired by her from the income derived from her husband's estate can be expected to deal with her only on the presumption that she has not parted with her control for the benefit of the reversionary heirs, and it will be subjecting such *bonâ fide* purchasers to serious hardship to throw upon them the onus of establishing, after the death of the widow, and it may be as in this very case many years after the transaction, that when the widow originally acquired the property she did not intend it to be an accretion to the husband's estate.

We must therefore allow the appeal and dismiss the suit as against the appellants with costs (one set) throughout.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Moore.

In Appeal No 119 of 1900 —

RAJAMANNAR AND ANOTHER (DEFENDANTS NOS. 1 AND 3),
APPELLANTS,

1902
January
9, 10, 15.

v.

VENKATAKRISHNAYYA AND ANOTHER (PLAINTIFF AND
DEFENDANT No 2), RESPONDENTS *

In Appeal No 125 of 1900 —

VENKATAKRISHNAYYA (PLAINTIFF), APPELLANT,

v

RAJAMANNAR AND OTHERS (DEFENDANTS), RESPONDENTS.†

Limitation Act—Act XV of 1877, sched II, art 123—Legacy in satisfaction of indebtedness—Claim for legacy with ancillary claim for administration of estate

By his will dated 27th April 1887, a testator provided as follows —“ My elder brother Ry V K. G's self acquisition to the extent of about Rs. 10,000 is kept with me So, that money should be given to him ” The testator died on 14th September 1888 In January 1887, plaintiff received Rs 6,000 on account and on 9th May 1899 he filed this suit against the son and executors of the deceased claiming that an account might be taken of the testator's property, and that it might be administered by the Court, and that the balance of principal and interest might be paid to plaintiff It was contended in defence that the Rs. 10,000 was not a legacy, but either a loan by plaintiff to the deceased or a deposit payable on demand, and that in either case it was barred by limitation

Held, that the bequest was a legacy in satisfaction of the indebtedness of the testator to plaintiff

Held also, that although plaintiff prayed for an administration of the estate, that prayer was only ancillary to his claim for the legacy, that article 123 of schedule II of the Limitation Act was applicable and that the suit was not barred

It was also contended that plaintiff was estopped from claiming a legacy under the will as he had disputed the validity of the latter, and had elected to take the Rs 10,000 as a debt due to himself and not as a legacy It appeared that plaintiff's brother had sued for a share in the testator's estate as family property and that plaintiff had supported him and had also claimed a share

Held, that there was no estoppel and plaintiff's right to the legacy was not affected by that claim

* Appeals Nos 119 and † No 125 of 1900 against the decree of S Gopalachari, Subordinate Judge of Kistna at Masulipatam, in Original Suit No. 13 of 1899

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SUIT to recover a legacy. By his will dated 27th April 1887, plaintiff's deceased brother provided as follows:—"My elder brother Ry. Venkatakrishnayya Garu's self acquisition to the extent of about Rs. 10,000 is kept with me. So, that money should be given to him." The testator died on 14th September 1888; and this suit was instituted on 9th May 1899. Plaintiff in his plaint admitted having received Rs. 6,000 on account and now claimed the balance with compound interest. The plaint claimed that an account might be taken of the testator's property, and that it might be administered by the Court, and that the principal and interest amounting to Rs. 16,362 should be paid to plaintiff. First defendant was the son of the deceased and second defendant was an executor; and third defendant was joined as he was alleged to have acted as an executor. The defendants, in separate written statements, pleaded that the suit was barred as the money had been advanced by plaintiff to the deceased by way of loan and not as a deposit; and that even if it was a deposit it was payable on demand; and that, more than three years previously, plaintiff had demanded that the sum should be paid, and no further demand had been made. They also contended that the deceased intended the Rs. 10,000 to be given to plaintiff in repayment of the loan and not as a legacy; also that a further sum of Rs. 4,000 had been paid to plaintiff in addition to the Rs. 6,000 admitted in the plaint.

The Subordinate Judge found that, in addition to the Rs. 6,000 admitted by plaintiff to have been received, a sum of Rs. 4,000 had been paid to him. He treated the Rs. 10,000 as a deposit to be repaid to plaintiff and not as a legacy and decreed in plaintiff's favour for Rs. 6,832.

Both parties preferred cross-appeals.

Sundara Ayyar and *Nagabhushanam* for appellants.

The Advocate-General (Hon'ble Mr. *J P Wallis*), Dr. *S. Swaminadhan*, and *S. Srinivasa Ayyangar* for respondent No. 1.

JUDGMENT.—The plaintiff sues for the recovery of a legacy of Rs. 10,000 bequeathed to him by his brother Chinnam Venkata Gopalam with interest thereon, the first defendant being the son of the deceased testator, and defendants Nos 2 and 3 the executors of the will:

The will is dated the 27th April 1887, and the provision in it, under which plaintiff claims, runs as follows:—"My elder brother

Ry. Venkatakrishnayya Garu's self acquisition to the extent of about Rs.10,000 is kept with me. So, that money should be given to him" There are several codicils to the will, the only one affecting the plaintiff being dated the 25th of July 1887 in which it is directed that the rupees that have to be given to him are to be paid immediately in cash. The testator died on the 14th September 1888, and this suit was brought on the 9th May 1899 which is within the twelve years period allowed by article 123 of the second schedule to the Limitation Act, for a suit for a legacy. The plaintiff admitted the receipt of Rs. 6,000 on account of the legacy on the 27th January 1897 and his claim for principal was therefore only Rs 4,000, but he further claimed compound interest at 6 per cent per annum, on Rs. 10,000 from 14th September 1888 to the part payment of Rs. 6,000 on the 27th January 1897, and on the balance of Rs 4,000 at the same rate from that date till the date of suit, making a total of Rs 16,362 odd. The Subordinate Judge finding that, besides the receipt of Rs. 6,000 admitted by plaintiff, Rs 4,000 had also been paid to him, and allowing only simple interest at 9 per cent per annum on the Rs. 10,000, treating it as a deposit to be repaid, and not as a legacy, decreed the plaintiff but Rs. 6,832 of his claim. In appeal No. 125 the plaintiff appeals against the disallowance of the remaining Rs. 9,530, and in appeal No 119 the first and third defendants appeal against the sum allowed to plaintiff.

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To take the defendants' appeal first, it was contended on their behalf (1) that the Rs. 10,000 was not a legacy, but either a loan by plaintiff to the testator or a deposit repayable on demand, in either of which cases the suit was barred by limitation, (2) that as a fact the whole amount of the principal had been discharged, and (3) that no interest was stipulated for. The Subordinate Judge decided on the first point that the limitation bar for the recovery of the sum as a deposit was saved by acknowledgments, on the second point in favour of the defendants, and on the third point that interest to run at 9 per cent. was intended by the parties.

We are unable to agree with the Subordinate Judge on the first question, for in our opinion the bequest of Rs. 10,000 was clearly a legacy meant as a satisfaction of the indebtedness of the testator to the plaintiff for money (as he expresses it) "kept with him" by the plaintiff. The mere fact that it finds place in a will

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not payable to the plaintiff till the testator's death, and is a round sum without any provision for interest, negatives the idea that it was a direction to the executors to pay a just and lawful debt. This they would have been bound to do, apart from the will, and the testator would probably have settled the amount in his lifetime if he considered that the money deposited with him was a debt pure and simple. We take it therefore that the Rs. 10,000 was a legacy, and consequently it is unnecessary for us to discuss the question whether, treating it as a deposit, the plaintiff's claim was or was not barred by limitation. The appellant's Vakil then urged that the suit if taken to be for a legacy was also barred inasmuch as it involved an administration of the estate, and administration suits were governed by article 120 of the second schedule of the Limitation Act under which the limitation is six years. We cannot accept this contention, for though it is true the plaintiff prayed for an administration it was only ancillary to his getting his legacy; when a suit for a legacy, for which twelve years is specifically allowed under article 123, entails administration of the testator's estate, it would be unreasonable to hold that that circumstance cuts down the period of limitation to six years under an indefinite article like 120, which does not refer to an administration or any particular suit but only to suits for which no other period of limitation is provided.

It was further urged that the plaintiff had no right to sue for the legacy as such, as his title thereto was not complete for want of the executor's assent (section 112 of the Probate and Administration Act V of 1881) and the only suit he could therefore bring was one for administration, which was clearly barred, but as regards this there is indubitable proof of one executor's express assent in exhibit F and of the other executor's in exhibit B. The last contention is that the plaintiff is estopped from claiming the legacy under the will as he has disputed the validity of the will, and has elected to take the Rs. 10,000 as a debt due to himself, and not as a legacy. What happened was that in a suit brought by a brother of the plaintiff claiming his share in the testator's estate as family property the plaintiff supported his brother and also claimed a share. It was then decided that the property was the sole property of the deceased, and that neither plaintiff nor his brother had a right to share therein. We do not see how the plaintiff's right to the legacy is affected thereby. Having had to

how to the decision that he had no independent right in the testator's property, he now seeks that he may recover what the testator gave him out of that property. There is no estoppel. And as to the alleged election, if he had agreed to accept the money as in repayment of a debt, and had actually so received it, he could not of course claim the same amount once again as a legacy. Having however failed to obtain it as a debt he is entitled to get it as a legacy. We accordingly decide on the first question that the suit as brought is maintainable, and is not barred by limitation.

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The second question is the subject of the cross appeal No. 125 by the plaintiff which may now be dealt with. The Subordinate Judge found that a sum of Rs. 4,000 paid by the testator to the plaintiff on the 30th of August 1887 was a part payment towards the Rs. 10,000 bequeathed to him. There is really nothing to support this finding. The plaintiff asserts that this sum of Rs. 4,000 was paid him on a different account, and the onus was on defendants to prove their allegation. The account, exhibit R, shows that the money was sent in reply to a letter, but that letter is not produced nor are its contents proved. Neither in exhibit R, nor in the letter, exhibit II, sending the money, is it mentioned on what account it is forwarded. In the absence of any explanation for the non-production of the letter referred to in exhibit R, which would probably show exactly for what the money was paid, the presumption is that if produced it would disprove the defendant's case. Further, the testator executed two codicils subsequent to the date of this payment, but in neither has he reduced the amount of his bequest of Rs. 10,000 by this Rs. 4,000, which he would surely have done had it been meant to go towards reducing the amount of the legacy in the will. We therefore find that it stands at Rs. 10,000.

The third and last question as to the rate of interest is easily solved by our finding that the amount claimed is a legacy. It becomes unnecessary to decide what the parties intended as to whether there should be any interest and if so, at what rate, because the law itself lays down what rate of interest shall be allowed and from what date it is to be computed. That rate is 6 per cent. per annum, and in this case it is to be calculated from the date of death of the testator; first, because the legacy was in satisfaction of a debt (see exception 1 to section 130 of the Probate

RAJAMANNAR and Administration Act V of 1881), and secondly, because the
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VENKATA- testator so expressly directed in a codicil already referred to (see
KRISHNAYYA. section 136 of the same Act).

The result is that the defendants' appeal (No. 119) succeeds so far as the rate of interest is concerned and the plaintiff's appeal (No. 125) so far as the principal sum of Rs. 4,000 is concerned. The first defendant not being an executor will also be exonerated from the decree to be passed, and the second and third defendants, the two executors, alone held liable to pay the amount adjudged out of the assets of the estate.

In lieu of the amounts decreed by the Subordinate Judge, there will be a decree for plaintiff for Rs. 4,000, the balance of the legacy still unpaid, with interest at 6 per cent. per annum on Rs. 10,000 the whole amount of the legacy from the 14th September 1888, the date of testator's death, to the 27th January 1897, when the part payment of Rs. 6,000 was made, and on the remaining Rs. 4,000 at the same rate from the 27th January 1897 to the date of this decree. The parties will receive and pay proportionate costs on the total amount now decreed in both Courts. The plaintiff will get subsequent interest at 6 per cent. per annum on the amount of this decree from this date to date of payment.

PRIVY COUNCIL.

VENKATA NARASIMHA NAIDU AND ANOTHER
(DEFENDANTS NOS. 1 AND 3), APPELLANTS,

v.

BHASHYAKARLU NAIDU AND ANOTHER (PLAINTIFFS),
AND ANOTHER (DEFENDANT NO. 2), RESPONDENTS.

P.C.*
1902.
February 14,
26.
April 18.

[On appeal from the High Court at Madras.]

Pleader—Authority to bind client—Power of pleader to abandon issue—Suit for partition—Power of Court to refuse to raise issue of limitation—Possession of and liability to account for joint family property—Failure to disclose possession of joint property.

A vakil's general powers in the conduct of a suit include the power to abandon an issue which, in his discretion, he thinks it inadvisable to press.

In a suit for partition against his brother the plaintiff alleged that the immoveable family property was joint, and that the defendant had been, during the minority of the plaintiff, in possession as manager on behalf of himself and the plaintiff. The defendant stated that the property was by family usage impartible and held by the senior member of the family, and denied that he had held it on behalf of the plaintiff and himself. At the hearing, after the other issues had been settled, the defendant asked to be allowed to raise an issue as to limitation on the ground that he had been in possession adversely to the plaintiff for more than 12 years, but the Judge refused to allow the issue to be raised:

Held, that no question of limitation necessarily arose on the pleadings and it was not obligatory on the Judge to direct an issue on that point.

Where the defendant admitted the existence of property as joint family property and could not charge the plaintiff with its possession, he was, as manager of the family, rightly held primarily responsible, and bound to account for it.

Where the plaintiff sought a complete partition of the whole of the family property and the plaintiff expressed his willingness to bring into hotchpot certain property the possession of which he had not admitted in his plaint, but which was afterwards found liable to partition:

Held, that no question arose as to his suit being one for partial partition, and therefore unmaintainable.

APPEAL from a decree (4th May 1899) of the High Court at Madras which affirmed with some modifications a decree (22nd April 1897) of the District Judge of Kistna in favour of the respondents Nos. 1 and 2.

* Present : Lords DAVEY, ROBERTSON, and Sir ANDREW SCOBLE.

VENKATA
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The appeal arose out of a suit brought on 29th March 1895 by the respondent No 1 against the first appellant and his two minor sons. The minor son of the plaintiff was subsequently added as a co-plaintiff in the suit, which was one for partition of the zamindari of Vallur, and of all the moveable and immoveable property held with it.

The plaint set out that the father of the plaintiff and of the first defendant died on 30th April 1869, he and his issue being then undivided, leaving joint family property; that at the time of their father's death the plaintiff was a minor, and the first defendant assumed the management of the joint property on behalf of himself and the plaintiff; that after attaining majority the plaintiff assisted in the management: and that in consequence of family differences the plaintiff asked for a division of the property which was refused. The plaint prayed for a partition of all the joint property, for an account, and the appointment of a receiver.

The first defendant put in a written statement in which he alleged that the lands described in the plaint constituted an impartible estate, known as the zamindari of Vallur which by family usage had always been treated as impartible and held by the senior member of the family, the junior members being only entitled to maintenance; that on the death of their father the first defendant had not assumed the management of the properties and continued to manage them on behalf of himself and the plaintiff; that the plaintiff was disqualified from claiming any interest in the properties: that he had fraudulently concealed a large amount of property which was in his possession, and that in consequence of all the property not being included, the suit was not maintainable.

Of the issues framed the first, fifth and sixth only are now material.

Firstly.—Whether all or any, or which, of the properties sued for are partible or impartible for the reasons given in paragraph 2 of the written statement? (by reason of family usage)

Fifthly.—What is the extent and value of the property available for partition?

Sixthly.—Whether the plaintiff is in possession of any of the properties besides those admitted by him in the plaint; if so, is the suit maintainable?

On 10th March 1897 before the above issues were tried, the first defendant applied to be allowed to raise a further issue, that the suit was barred by limitation, on the following grounds:—

"1. Upon the facts alleged in the pleadings and the views of the case urged by the parties respectively, an issue arises whether the suit is time-barred or not, and that such an issue has not been framed.

"2. Granting, for argument's sake that, at the time of the death of the father of the plaintiff and the first defendant, the estate was joint property in which both brothers were entitled to shares, the subsequent enjoyment of it by the first defendant above as its sole proprietor and as the holder of an impartible estate, and the plaintiff's acquiescence in that position of the first defendant together with the understanding that his position was that of a person only fit to be maintained, for a period of over twenty-five years, operates as exclusion of the plaintiff for that long period from the estate as a joint proprietor and causes his suit to be time-barred."

This application was refused by the District Judge in the following order:—

"I decline to add the issue. Defendant based his defence on the impartibility of the zamindari. No mention was made in the written statement that the claim was time-barred. Apparently the object of the issue is now to put forward another title by prescription. It appears to me too late to allow defendant to shift his ground now. It would necessitate another lengthy adjournment and interrogatories. If it is conceded that the family is joint and the estate partible, plaintiff cannot be said to have been excluded while in receipt of maintenance."

As to this the High Court (MOORE and O'FARRELL, JJ.) observed as follows:—

"MOORE, J.—I cannot admit the contention that the question as to whether the suit was barred by limitation was raised or even suggested by the pleadings. Mr. Brown, on behalf of the second defendant, urges that the wording of paragraph 8 of the plaint shows that the question as to limitation was in the mind of whoever drew up that document and that when the first defendant in paragraph 5 of his written statement traversed the allegation there made it was patent that the parties were at issue as to limitation and that opportunity should therefore have been given for having the question tried and decided. I cannot accept the argument. What is alleged in paragraph 8 of the plaint is that after the death (in 1869) of the father of the first defendant and the first plaintiff, the first

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defendant assumed the management of the family properties, the first plaintiff being then a minor, and that he has continued ever since to manage them on behalf of himself and of the first plaintiff who it is also alleged has, since he became a major, assisted his brother in the management. There appears to me to be no reasonable doubt that it was the question which was embodied in the first issue and not that with respect to limitation which was present to the mind of the framer of this paragraph. The contention put forward was in fact as follows:—The first defendant did not, on the death of his father, take possession of the whole estate and assume the sole management, because the zamindari was impartible and he was the eldest son; but because his younger brother was a minor and as such incapable of managing or assisting in the management. In paragraph 5 of the written statement the first defendant traverses these assertions and denies that he assumed and continued the management on behalf of both himself and his brother. Here it is clear that his contention is that he assumed and retained the management because the zamindari was impartible and belonged to him in its entirety. I can find no plea as to limitation. If an issue as to limitation or any other matter arises on the pleadings, it is certainly the duty of the Judge, at however late a stage application to do so may be made, to frame the necessary issue; but where no such issue arises on the pleadings, as I am clearly of opinion that it did not in the present case, he exercises a sound discretion if, as the Judge did in this case, he refuses to allow fresh contentions to be raised long after the filing of the suit. For these reasons I reject this ground of appeal.”

“O’FARRELL, J.—The allegation, in my opinion, was not distinctly put forward in the pleadings, nor was an issue asked for at the first hearing on 24th July 1896. The contention was raised for the first time on the 10th March 1897 and after an application for adjournment of the suit had been refused (see paragraphs 5 and 6 of the lower Court’s judgment). I think therefore that the District Judge was not bound to frame the additional issue. He had no doubt adiscretion to do so, but seeing that the issue was asked for at so late a stage and involved a dispute as to a question of fact, I think he rightly exercised that discretion in refusing to frame it. I would add that, for the reasons already given in connection with the first issue, I must hold that the second and third defendants have no right to raise the question at all.”

The first issue (as to whether the zamandari was impartible or not) was abandoned by the vakils for the first defendant on 22nd

March 1897 under the following circumstances:—On 12th and 15th March 1897 the first defendant's witnesses Nos 1 to 5 were examined in reference to that issue. On 16th March certain documents which, at the instance of the plaintiff, had been sent under cover to the District Judge from the Collector's office were opened and read by the Judge who intimated to the parties that they were quite inconsistent with the first defendant's contention. Thereupon the first defendant's pleader orally applied for inspection of the documents, which was refused, and on the same day filed a petition for leave to read the papers and to have certified copies granted. This petition was opposed by a counter-petition of the plaintiff and both petitions were disposed of by an order, dated 17th March, refusing the first defendant's petition. On the same day fresh warrants to attend and give evidence and produce documents were ordered to issue against two witnesses who had failed to attend on previous summonses and warrants. The returns to the warrants so issued showed that one of the witnesses was a bed-ridden old man, and that he sent seven documents to the Court in a sealed cover which was handed to the District Judge on 22nd March. On the morning of that day the dewan of the first defendant informed the pleaders who were conducting the defence that he had learnt that the witnesses had turned hostile and that he did not expect that they would attend or produce the required documents, and that in that event the first issue might, under the circumstances, be abandoned. Upon the hearing being resumed on 22nd March the witnesses did not attend and the pleaders found that the documents sent were not the documents expected, but other documents having no bearing on the case. They thereupon abandoned the first issue.

The first defendant took objection to the action of his vakils in abandoning the first issue, and set out his objection in his grounds of appeal to the High Court supporting it by his own affidavit and by the affidavits of his dewan and pleaders. As to this ground of appeal the High Court said:—

“MOORE, J.—The only point for consideration is as to whether it was within the ordinary powers given to the vakils for the conduct of the suit to abandon an issue when they, whether rightly or wrongly, arrived at the conclusion that their contentions as to it were untenable. I am clearly of opinion that this question must be answered in the affirmative. It must be held that a vakil appointed

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to conduct a case on behalf of his client, has the power to ask for an issue or to abandon an issue, to get a witness summoned or to dispense with his evidence. Without such powers no case could be tried without frequent adjournments and endless references to the parties. Whether the vakils in the present case acted wisely or the contrary in giving up this issue it is impossible to say in the absence of evidence as to it on the record; but it is perfectly clear that their action was taken deliberately and was not objected to by their client till he went to Madras to give instructions as to the filing of this appeal in September 1897. The zamindar, in his affidavit of 21st September 1897 drawn up in Madras, states that he was absent from Masulipatam when the issue was abandoned and did not return there until 26th March 1897. He says he then ascertained for the first time that the issue had been given up and wanted to apply to the District Court to get it re-opened, but was informed that it was useless to do so. It is not easy to accept this statement. It is most improbable that if he really at the time objected to the action of his vakils he would have done nothing to repudiate it till he was in Madras in the following September. It is difficult to resist the inference that the relinquishment of the issue was not opposed to his wishes, and that it was not till he was arranging in Madras for the presentation of his appeal that he changed his opinion on this point. However this may be, I have no hesitation in holding that the zamindar's vakils did not exceed their powers in abandoning the issue before the District Judge and that it cannot be re-opened now."

"O'FARRELL, J.—The simple question, then, is whether a pleader's general power in the conduct of a suit include the abandonment of an issue which, in his discretion, he thinks it inadvisable to press. No case has been cited which, in my opinion, goes the full length contended for by the learned counsel for the appellant of declaring, in distinct terms, that a pleader has no such general authority. On the contrary, it was held in a case decided by the Privy Council in 1839 (*Rajinder Narain Rae v. Bijai Govind Sing*(1)) that the admission and consent of a vakil made with due authority (which would appear to mean properly authorised to conduct proceedings in the suit) will bind his client though not present at the time of making it. In that case, Lord Brougham observed that if it were held otherwise 'it would not be safe to see any agent or counsel, without letting the parties appear in the most trifling matter. The Courts must in all cases see the parties

(1) (1839) 2 M.J.A., 253.

themselves, if they are not to be bound by their agents.' No distinction is drawn, it will be observed, between counsel whose consent, unless against the express wish of his client, will be binding (*Carrison v. Rodrigues*(1)) and vakils or other agents. The principle enunciated in that case is followed in *Jagapati Mudaliar v. Ekambara Mudaliar*(2), where a distinction is drawn between giving up a right by way of compromise and 'the power to bind by admissions which, in effect, is but dispensing with proof of the facts admitted, and is one of the well recognised incidents of a pleader's general authority.' In the light of that decision which is the only one of this Court of those cited to us which deals with the precise question at issue, I do not think there is any need to consider, so far as the first defendant is concerned, the Bengal decisions which have been cited. I may observe, however, that from the observations of HOBHOUSE, J, in *Gour Pershad Doss v. Sookdeb Ram Deb*(3), the case mainly relied upon by counsel for the appellants, it would rather seem that what the vakil there gave up was a claim already admitted or proved and which the Court below was prepared to decree in favour of the client. If so, the case is not in point. I can see no valid ground for the distinction that has been attempted to be drawn between making admissions as to relevant facts and abandoning an issue, which is only another form of admission. It is true that in the present case it is alleged that the defendant's pleaders improperly took certain documents off the record after the issue was abandoned, but the defendant was not prejudiced by their action, inasmuch as the learned counsel does not contend that on those documents coupled with the oral evidence still on the record a finding in favour of his client could have been arrived at without further evidence."

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On the fifth issue the only question in dispute was as to the existence or non-existence in the first defendant's possession of a treasure consisting of 107,502 gold pagodas. As to this the District Judge held on the evidence that this treasure did form a part of the assets of the family at the institution of the suit, and that the defendants were accountable for it: and this finding was upheld by the High Court.

On the sixth issue a question of law was raised. The facts which gave rise to it were as follows:—Appended to the plaint were various schedules setting out the property, of which the plaintiff claimed a share. Schedule H related to property belonging to the

(1) (1886) I.L.R., 13 Cal., 115.

(2) (1897) I.L.R., 21 Mad., 274.

(3) (1869) 12 W.R., (C.R.), 279.

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plaintiff which had passed into the possession of the first defendant. The plaintiff stated that he had left it behind when he and two of the first defendant's wives left for Cocanada in consequence of a family quarrel; that it was left in locked boxes and that on his return he found the boxes broken open. The property was valued at Rs. 36,133. Schedule H1 contained six articles in the plaintiff's possession of the value of Rs. 6,100. He did not include in his schedules the jewelry in the possession of the first defendant and his sons, nor that worn by the first defendants' daughters, nor the jewels worn by the first defendant's wives or by his own wife. This he accounted for by saying he supposed the ladies' jewels were their stridhanam. Nor did he make any reference to the samasthanam, or estate, jewelry, though it was the most valuable portion of the moveable property, and was family property in which he claimed a share. When the first defendant put in his written statement he alleged that the plaintiff had fraudulently concealed property worth 2½ lakhs which was in plaintiff's possession and in that of the first defendant's two wives (sisters of the plaintiff's wife) who were then living with him. He appended to his statement schedule I which gave a list of the estate jewels, being female jewelry not the stridhanam of the females, but jewels lent to and worn by them on special festival occasions; and schedule II of other jewels in the plaintiff's possession (including those admitted by the plaintiff in his schedule H1) being jewels which had been provided for the use of the plaintiff out of family funds. In reply, the plaintiff filed a petition No. 508 of 1896 in which he denied possession of anything in schedule I whilst claiming his share of it. As to schedule II he submitted a schedule H2 of jewels included in schedule II which he said were in his wife's possession and which he did not object to being divided if those in the possession of the defendant's wives and children were also divided. Subsequently he undertook, through his counsel, to give the first defendant credit for half the value of the property mentioned in schedule H2.

On these facts it was contended that the plaintiff, by failing to include in his plaint schedule the property in H2 which was found liable to partition had in effect brought a suit for partial partition, and that his suit was therefore liable to be dismissed.

The District Judge found that the plaintiff was not in possession of any jewels included in schedule I or II beyond those admitted in schedules H1 and H2. On the question of law he held that the

omission to include in the plaint the articles subsequently included in H2 did not prevent the suit being maintainable. As regards the property in schedule I he held that as no mention was made of it in the plaint schedules, it must be presumed that the plaintiff had abandoned his claim to a share of it. He made a decree for partition of the rest of the family property between the plaintiff and first defendant.

From this decree the defendants appealed to the High Court and the plaintiff filed objections to the non-inclusion of the property in schedule I.

The High Court held that the suit was not one for a partial partition : as to this they said :—

“MOORE, J.—It is quite clear from this recital of facts that this is not a case of a plaintiff suing for a partial division of property. What is shown is that the first plaintiff, when filing his plaint and schedules, made no mention of the jewels in the possession of his wife. When the first defendant filed a schedule with his written statement showing jewels alleged to be in the first plaintiff's possession the latter admitted that the greater portion of these jewels were with his wife, but declined to allow them to be divided unless the jewels in the possession of the first defendant's wives and children were also divided. He, however, subsequently withdrew this plea. Here it is evident that there is no suit for partial division. As regards certain property which he never denied was in his possession, the first plaintiff, in the first instance, put forward a plea that it should not be divided except on certain conditions but subsequently abandoned that contention. The decision of the District Judge on the sixth issue must be upheld.

“O'FARRELL, J.—A suit brought expressly for the purpose of effecting a partition of a portion only of joint family property, will not lie. The present is not such a suit. It is one brought for the division of the whole of the family properties, moveable and immoveable, and the mere omission, whether accidental or fraudulent, to specifically include in the plaint certain of the joint properties, where such properties are ascertained and a decree can be given for partition, will not convert the suit into one for partial partition.”

As to the property in schedule I, the estate jewels, the High Court held that this plaintiff had not, by omitting to refer to them, relinquished his right to a share of them and that the first defendant having admitted the existence of them as joint family property, and having failed to show that the plaintiff was in possession of them, must, in the absence of any proof that they had

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ceased to be in his own custody, he held accountable for them. They therefore modified the decree of the District Judge by giving the plaintiff a moiety of the property in schedule I as well as of the other family property.

On this appeal Mr. *Mayne* and Mr. *Cottari Venkatramana Nayudu*, for the appellants, contended: *first*, that the first defendant ought to have been allowed to raise an issue as to limitation. His written statement complied strictly with the Civil Procedure Code which required it to be confined to a simple narrative of the facts which he believed to be material to the case, and which he admitted or believed he would be able to prove; it expressly put in issue the question whether he was in possession from 1869 to 1895 on behalf of himself and the first plaintiff, or whether his possession was exclusive; he was neither entitled nor bound to state the legal inference from the facts alleged, and it would have been the duty of the Court itself of its own motion to frame an issue as to limitation in the course of the trial of the suit had it appeared that a question of limitation arose on the evidence. Here the issue was asked for before the trial of the suit had commenced, and it is submitted that the Judge was wrong in refusing to raise it. The first defendant had evidence (and applied to be allowed to produce it, but his application was refused) which would have shown that his possession from 1869 to 1895 was exclusive. *Second*, that the pleaders had no authority from the defendants, and in the absence of such authority had no power to abandon the first issue, as to impartibility, and the defendants had never acquiesced in their action in abandoning it, and it was submitted that the defendants were not bound by such action, but were entitled to have that issue fully tried. *Third*, that as to the existence of the hoard of treasure the decision of the High Court proceeded wholly on inferences and suppositions: there was only the oath of the plaintiff against that of the defendant, and the story told by the plaintiff was an extremely improbable one. *Fourth*, that the plaintiff had intentionally abandoned part of his cause of action, and, under section 43 of the Civil Procedure Code, he was not entitled to a decree for any portion of what, by his deliberate omission to include it in his claim, he had relinquished. *Fifth*, that by what the defendants allege to be his fraudulent concealment of some of the property liable to partition, namely, the jewelry specified in schedules H1 and H2, the plaintiff is in effect suing for partial

partition and his suit is consequently not maintainable (*Nanabhai Vallabhdas v. Nathabhai Haribhai*(1), *Chinna Sunyasi v. Suriya*(2), and *Jogendra Nath Mukerji v. Jugobundhu Mukerji*(3)). *Sith*, that the High Court was wrong in holding that the defendant's failure to show that the plaintiff was in possession of the property in schedule I of itself entitled the plaintiff to a decree for a moiety of that property.

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Sir J. Jardine K. C, Mr. A. Phillips, Mr. H. H. Shephard, and Mr. C. Krishnan for the respondents Nos. 1 and 2 were not called upon.

On the 18th April 1902 the judgment of their Lordships was delivered by Sir ANDREW SCOBLE.

JUDGMENT—This is an appeal against a judgment of the High Court at Madras which affirmed with some modifications a decree of the District Court of Kistna in that Presidency. The suit was brought to obtain a partition of the zamindari of Vallur and the moveable and immoveable property held therewith. The principal plaintiff is the younger brother of the principal defendant, the other parties being minor sons of the plaintiff and defendant, respectively, who were made parties for conformity.

The property in question is of considerable amount, and the suit was hotly contested, many issues being raised to which it is unnecessary now to refer. The main contention in the District Court was that, whereas the principal plaintiff alleged that the parties were members of an undivided Hindu family, the principal defendant asserted that the zamindari was impartible by family custom, and that the junior members were only entitled to maintenance out of the family estate. But, after a certain amount of evidence had been recorded, this contention was abandoned by the defendant's vakils, and the issue was decided in favour of the plaintiffs. It was one of the grounds of appeal to the High Court that the vakils exceeded their authority in giving up this issue, but the High Court held that a vakil's "general powers in the conduct of a suit include the abandonment of an issue which, in his discretion, he thinks it inadvisable to press;" and in this opinion their Lordships concur.

(1) (1870) 7 Bom. H.C.R., (A.C.J.), 46. (2) (1882) I.L.R., 5 Mad., 196,
(3) (1886) I.L.R., 14 Cal., 122.

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Before the issue of impartibility was decided, and before any evidence had been recorded, the defendants' vakils applied to raise a general issue that the suit was time-barred, and the District Judge's refusal to raise such an issue has been made a ground of appeal both in the High Court and before their Lordships. But no question of limitation is raised upon the pleadings, and the Judges of the High Court held that although the District Judge had a discretion to raise such an issue, even at the stage of the proceedings at which it was asked for, he was not bound to raise it, and rightly exercised his discretion in refusing to do so. The written statement merely contains a traverse of the allegation that the principal appellant had managed the properties on behalf of himself and the plaintiff. The facts stated in the pleadings as to the appellants' possession were at least consistent with either hypothesis that the zamindari was impartible or that it was partible family property. The character of the possession was dependent on the determination of that issue. In their Lordships' opinion no question of limitation was either raised by the pleadings or arose upon the evidence and it was not obligatory on the Judge to direct an issue.

Three questions were raised before their Lordships with regard to details of the property to be included in the partition. The first of these related to a hoard of gold coins, called varahalu petta, of the estimated value of ten lakhs of rupees or thereabouts. This hoard is said to have originated in loot obtained at the siege of Seringapatam by the founder of the family, (who was a contractor attached to the British force), and to have been concealed for many years in a hollow beam in the fort of Vallur. From this receptacle, some twenty years ago, according to the principal plaintiff's story, the principal plaintiff and principal defendant removed the treasure which was then found to consist of 107,000 pagodas, and placed it in a chest in the main hall of the fort, where it was watched night and day by a guard. In 1888, an attempt was made to steal the chest, and the treasure was consequently transferred to an iron safe in another room in the fort, with a guard outside the window. In 1894, it is suggested that the principal defendant paid a flying visit to Vallur, and removed the treasure and other valuables. It was contended before their Lordships that this was an incredible story, and no doubt it does contain some elements of romance, but the District

Judge, who heard the evidence and saw the witnesses, believed it, and the High Court, after careful consideration, confirmed the finding of the District Court, both as to the existence and value of the treasure. From this concurrent opinion of both Courts upon a question of fact their Lordships see no reason to dissent.

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The second question is as to certain jewels, designated as samasthanam or estate family jewels, that is to say, jewels belonging to the estate, and worn by members of the family on special festival occasions. There is some conflict of evidence as to the place of custody of these jewels, but it is admitted that they were not in the possession of the principal plaintiff, and the High Court held that as the principal defendant admitted the existence of these jewels as joint family property, and could not charge the principal plaintiff with possession of them, he as manager of the family was primarily responsible, and was bound to account for them. This appears to their Lordships to be a correct conclusion.

The last question is as to certain jewels enumerated in schedules H1 and H2 to the plaint, which are admitted to be in the possession of the principal plaintiff, and which for some inadequate reason, he at first appears to have considered not liable to partition. It was argued that his failure to disclose at the outset his possession of this property converted the suit into one for partial partition only, and that the suit ought therefore to have been dismissed. But their Lordships cannot assent to this argument. The plaint seeks a complete partition of the whole of the family property, and at an early stage of the case, the principal plaintiff expressed his willingness to bring these jewels into hotchpot. The decree of the District Court accordingly directs a valuation and a scheme of division into two equal shares of the moveables mentioned in schedules H1 and H2 as well as of the rest of the family property. There is therefore no question of partial partition.

For these reasons, their Lordships will humbly advise His Majesty that the decree of the High Court ought to be confirmed and this appeal dismissed. The appellants must pay the costs of the first and second respondents who alone defended this appeal; but the appellants are not to be called upon to pay any costs incidental to the appendix to the record, which was sent at the request and at the costs of the respondents and was not used in the proceedings here.

Appeal dismissed.

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Solicitor for the appellants: Mr. R. T. Tasker.

Solicitors for the respondents Nos 1 and 2: Messrs. Lawford,
Waterhouse & Lawford.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

VALAMBAL AMMAL, (PLAINTIFF), APPELLANT,

v.

VYTHILINGA MUDALIAR (DEFENDANT), RESPONDENT.*

1900
October 30,
December 19,
1902
January 3.

Court Fees Act—Art VII of 1870, s. 28. Dismissal of duty on plaint and on memorandum of appeal—Order by High Court on second appeal for payment of duty for plaint and on Civil Procedure Code Art XIV of 1882, s. 552A. Retrospective validation of defect in memorandum of appeal—Effect of this action on decree on plaint.

In a suit for the cancellation of a sale-deed executed by plaintiff to defendant for Rs. 2,500 stamp duty of Rs. 10 was paid on the plaint. The suit was dismissed by the District Munsif and plaintiff appealed to the District Court, paying a similar duty on the memorandum of appeal. The District Court dismissed the appeal, whereupon plaintiff filed a second appeal paying stamp duty thereon Rs. 150.

On objection being taken in the High Court that the second appeal could not be entertained because of the insufficient payment of stamp duty in the lower Courts, the High Court held that the proper Court fee payable on the plaint and on the memorandum of appeal was Rs. 150, and ordered under section 28 of the Court Fees Act, that such fees be paid within twenty-one days. The duty having been paid in due time, the High Court considered and decided the second appeal on its merits.

Suit for the cancellation of a sale-deed executed to defendant by plaintiff for Rs. 2,500. A Court fee of only Rs. 10 had been paid on the plaint, and, on appeal to the District Court against the Munsif's order of dismissal, a similar stamp duty had been paid on the memorandum of appeal. The appeal having been dismissed, plaintiff preferred a second appeal, stamp duty of Rs. 150 being paid on the memorandum of second appeal in the High Court. Objection was raised by the respondent at the hearing of the

* Second Appeal No. 1136 of 1899 against the decree of H. G. Joseph, District Judge of Trichinopoly, in Appeal Suit No. 111 of 1898, affirming the decree of S. Mahadeva Sastri, District Munsif of Kulitalai, in Original Suit No. 679 of 1896.

second appeal that the second appeal could not be entertained because the plaint and memorandum of appeal in the lower Appellate Court had been insufficiently stamped.

Sundara Ayyar, K. Ramachandria Ayyar, and T. Natesa Ayyar for appellant.

V. Krishnasami Ayyar for respondent.

JUDGMENT.—This is a suit for the cancellation of a sale-deed executed to the defendant by the plaintiff for Rs. 2,500. In this Court, on second appeal, a stamp duty for Rs. 150 was paid. On behalf of the respondent, the objection was raised that this Court could not entertain the appeal because in the Court of First Instance and in the lower Appellate Court a stamp duty of Rs. 10 only had been paid.

As regards the appeal to the lower Appellate Court the effect of section 582A of the Code of Civil Procedure is to enable a defective memorandum of appeal to be retrospectively validated if the insufficiency of the stamp was caused by mistake on the part of the appellant. This section appears to have been introduced for the purpose of meeting a decision of a Full Bench of the Allahabad High Court—a decision which was dissented from by this Court in *Chennappa v. Raghunatha*(1) and *Patcha Sahib v. Sub-Collector of North Arcot*(2) to the effect that if a memorandum of appeal is not, when tendered, properly stamped, it is not at that time a memorandum of appeal, and the subsequent affixing of the proper stamp cannot have a retrospective effect so as to validate the original presentation unless it has been done by order of the Court, and the Court cannot make any such order unless the memorandum has been received, filed or used through mistake or inadvertence on the part of the Court or its officers (*Ballaran Rai v. Gobind Nath Tiwari*(3)).

This section makes it clear that, at any rate as regards memoranda of appeals and applications for review, when the document is insufficiently stamped by reason of the mistake of the party, the defect may be afterwards made good and the document will be as valid as if it had been properly stamped in the first instance. The argument on behalf of the respondent was that, inasmuch as the Legislature in section 582A had dealt

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(1) I.L.R., 15 Mad., 29.

(2) I.L.R., 15 Mad., 78.

(3) I.L.R., 12 All., 129.

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expressly with insufficiently stamped memoranda of appeals without reference to insufficiently stamped plaints, the inference was that a defective plaint could not be subsequently validated so as to avoid the operation of the law of limitation. We do not think that such an inference ought to be drawn. The Allahabad decision only had reference to a defective memorandum of appeal and section 582A was apparently intended to meet this particular decision.

As regards the plaint, the argument on behalf of the defendant was that the plaint not having been properly stamped the suit must be regarded as not having been instituted within the prescribed period, and that any order made under section 28 of the Court Fees Act would not operate retrospectively since that section must be read subject to the express provisions of section 4 of the Limitation Act. It was contended that, inasmuch as the plaint was not stamped in accordance with the requirements of section 6 of the Court Fees Act, there had been no plaint at all and that illustration (a) to section 1 of the Limitation Act shows that this Court has no alternative but to dismiss the suit as being now barred by limitation.

In the present case the plaint was filed and used without being properly stamped through mistake of law as to the Court fee payable. The case therefore falls within the express words of the second paragraph of section 28 of the Court Fees Act. The decision of this Court in *Venkatramayya v. Krishnayya*(1) is, in our opinion, clearly distinguishable from the present case. In that case plaint was presented on the day before the period of limitation expired and was rejected under section 54 (b) of the Code of Civil Procedure. The plaint was re-presented on the proper stamp paper within the time required by the Court, the period of limitation having then expired. The Court held that the suit was not instituted in time upon the ground that section 54 of the Code of Civil Procedure does not give a Court any power to extend the ordinarily prescribed period of limitation for suits. In *Jaini Prasad v. Bachu Singh*(2) a Full Bench of the Allahabad High Court took the same view.

When the Court acts under section 54 of the Code of Civil Procedure it rejects the plaint. In *Venkatramayya v.*

(1) I.L.R., 20 Mad., 319.

(2) I.L.R., 15 All., 65.

Krishnayya(1) the period of limitation expired before the plaint was accepted. There was thus according to the view taken in that case, no suit in existence at the time the period of limitation expired. In the present case the plaint was never rejected. It was accepted and acted upon by the Court and the plaintiff's claim has been adjudicated upon both by the Court of First Instance and the lower Appellate Court. In the present case it cannot be said that there was no existing suit at the time the period of limitation expired.

We hold that the proper Court fee payable on the plaint and the memorandum of appeal is Rs. 150 and we make an order under section 28 of the Court Fees Act that a Court fee of Rs. 150 be paid on the plaint and on the memorandum of appeal within 21 days. (Stamp duty was duly paid.)

The case coming on for hearing after the payment of the proper Court fees as directed above, the Court considered and decided it on the merits.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Moore.

SUBBUTHAYAMMAL (COUNTER-PETITIONER—ATTACHING-CREDITOR),
APPELLANT,

1901.
July 31.

v.

CHIDAMBARAM ASARI (PETITIONER—TRANSFEREE-PLAINTIFF),
RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 232—Order refusing to recognize transferee of decree—Appeal.

An order passed under section 232 of the Civil Procedure Code refusing to recognize the transferee of a decree, may, for purposes of appeal, be regarded as an order passed under section 244 and is therefore appealable.

(1) I.L.R., 20 Mad., 319.

* Civil Miscellaneous Second Appeal No. 68 of 1900 against the decree of H. Moberly, District Judge of Madura, in Appeal Suit No. 182 of 1900, reversing the order of A. Narayanan Nambiar, District Munsif of Madura, on Execution Petition No. 827 of 1899, in Original Suit No. 39 of 1899,

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Virasami Rowth v. Bodi Naikan (Appeal against Appellate Order No. 60 of 1899 (see *infra* *)), followed.

PETITION for execution. The holder of a decree assigned it to the petitioner, who thereupon applied to the District Munsif for its execution. Objection was raised by the counter-petitioner, an attaching-creditor, on the ground that the assignment was fraudulent. The Munsif dismissed the petition, holding that petitioner should establish his right by suit. Petitioner appealed to the District Judge, who held that the Munsif's order was wrong inasmuch as execution of the decree was not stayed by it as required by section 244 of the Code of Civil Procedure, although the petitioner had been referred to a regular suit. He also decided that the order refusing to bring petitioner on the record as the representative of the decree-holder had been passed under section 244, on the authority of *Badri Narain v. Jai Kishen Das*(1) and *Manikkam v. Tatayya*(2) and the Munsif was directed to decide the question himself by an order under section 244. The Munsif then found that petitioner was not the representative of the decree-holder, whereupon the petitioner appealed to the District Court.

The District Judge, after considering the evidence relating to the assignment, allowed the appeal, reversed the Munsif's order, and directed that petitioner should be brought on the record as the representative of the decree-holder, and that he should be allowed to execute the decree.

Counter-petitioner preferred this appeal, on the ground, among others, that section 244 was not applicable and that the District Court had no jurisdiction to reverse the Munsif's order.

* Appeal against Appellate Order No. 60 of 1899 (unreported).—The judgment referred to, which was delivered by SHEPARD and BENSON, JJ., on 24th April 1900, is as follows:—"The Madras cases were decided without reference to the change of law brought about by Act VII of 1888. By that Act section 244 of the Code of Civil Procedure is amended and a question as to who is the representative of a party for the purpose of that section may be determined by an order under the section.

"The change of law is referred to in *Manikkam v. Tatayya*, (I.L.R., 21 Mad., 388), and in *Badri Narain v. Jai Kishen Das*, (I.L.R., 16 All., 483), followed in *Dwar Buksh Sirkar v. Fatik Jali*, (I.L.R., 26 Calc., 250), it is held that an appeal does lie against an order refusing to recognize the transfer of a decree. For purposes of appeal the order must be regarded as one made under section 244, Civil Procedure Code."

(1) I.L.R., 16 All., 483.

(2) I.L.R., 21 Mad., 388.

V. C. Desikachariar for appellant.

Sivasami Ayyar for respondent.

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JUDGMENT.—A Bench of this Court has decided in *Virasami Rowth v. Bodi Naikan*(1) that an order refusing to recognize the transferee of a decree passed under section 232 of the Code of Civil Procedure may, contest or no contest, for purposes of appeal, be regarded as an order passed under section 244 and is therefore appealable. That concludes the matter and this appeal is accordingly dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

KANTHU PUNJA (PLAINTIFF), APPELLANT,

v.

VITTAMMA AND OTHERS (DEFENDANTS),
RESPONDENTS.*

* 1901.
August
7, 8.

Contract Act—Act IX of 1872, s. 45—Right of succession by legal representative — Aliyasantana law — Fund settled on marriage of husband and wife — Interest payable to both jointly — Death of husband — Claim by widow by right of survivorship — Right of husband's legal representative to his share.

Upon the marriage of first defendant with K, a sum of money was settled by first defendant's mother, on first defendant or on K. This money was lent on mortgage, and by the terms of the mortgage, interest was payable by the mortgagors to first defendant and to her husband K, jointly, with the exception of that which would accrue in respect of the last year of the term, which, together with the principal sum secured by the mortgage, was to be paid to first defendant herself. K died, whereupon plaintiff, as K's legal representative, brought the present suit to recover the interest due under the mortgage:

Held, that plaintiff was entitled, under section 45 of the Contract Act, as the legal representative of K, to a moiety of the interest which had accrued since the death of K, first defendant being entitled to the other moiety, and that the right to the whole of the interest did not pass by survivorship to first defendant. The circumstance that K and first defendant intended to live and did in fact

(1) Appeal against Appellate Order No. 60 of 1899 (unreported)—see page 384—foot-note.

* Appeal No. 164 of 1900 against the decree of U. Achutan Nayar, Subordinate Judge of South Canara, in Original Suit No. 136 of 1898.

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live together as husband and wife under the Aliyasantana law was insufficient to raise the presumption of a contract that there was to be a right of succession by survivorship between K and first defendant in respect of the settled fund.

SUIT for a declaration that plaintiff was entitled to recover the amount of a hypothecation bond executed by defendants Nos. 2 and 3 in favour of first defendant and her deceased husband, Koraga Chetti, and of interest due thereunder for 1897 and 1898 from defendants Nos. 2 and 3 by sale of the hypothecated property. Plaintiff was the legal representative of Koraga Chetti. The principal sum due under the mortgage was payable in 1905, and plaintiff prayed for a perpetual injunction restraining defendants Nos. 2 and 3 from paying the principal and future interest to first defendant. It was asserted in the plaint that Koraga Chetti had been the real manager of the family since 1894, up to which date his mother, the senior member, who was now disabled by infirmity, had been manager; that in the capacity of manager he held in his possession the savings and the family jewels, and that out of such funds had obtained the plaint bond in the name of himself and his wife to defraud the family. As the second and third defendants declined to accept a notice of demand sent by the plaintiff, and the first defendant set up her own title to the bond, the plaintiff brought the suit. The first defendant denied that the bond had been obtained out of family funds, that her husband held in his possession such funds or that he had been managing the family affairs since or before 1894. She averred that the consideration had been paid out of her private means, and acknowledged receipt of the interest for 1897 and 1898. She also pleaded that the suit was barred by section 43 of the Code of Civil Procedure. The second and third defendants supported the first defendant's contentions as to payment of consideration out of her private means and of the discharge for the interest for 1897 and 1898. By the terms of the bond interest was payable by the mortgagors (defendants Nos. 2 and 3) annually to both Koraga Chetti and his wife (first defendant) jointly, with the exception of that which would become due in respect of the last year of the term of mortgage, which interest, together with the principal due under the mortgage was payable to first defendant alone. The evidence established, in the opinion of the High Court, that the mortgage amount had been settled by first defendant's mother, on the occasion of first defendant's

marriage with Koraga Chetti, either on first defendant or on Koraga Chetti.

The Subordinate Judge dismissed the suit on the ground that the plaintiff had not established that the mortgage money had been lent out of the funds of the plaintiff's tarwad.

Plaintiff preferred this appeal.

K. Narayana Rao for appellant.

Sundara Ayyar and *H. Narayana Rao* for respondents.

JUDGMENT.—We concur with the Subordinate Judge's finding that the evidence adduced on behalf of the plaintiff is not sufficient to establish that the principal of the mortgage bond was lent out of the funds of the plaintiff's tarwad. The evidence adduced on behalf of the first defendant coupled with the nature of the transaction evidenced by the mortgage bond, clearly establishes in our opinion that on the occasion of first defendant's marriage with Koraga Chetti, the nephew of the plaintiff, the sum of Rs. 4,000 in question was settled by the first defendant's mother either on the first defendant herself or on Koraga Chetti, but it is difficult to say upon which of the two it was really settled. But in the view which we take of the case it is immaterial upon whom it was really settled, or whether it was settled upon both jointly. Under the terms of the mortgage instrument which was executed by the mortgagors, the second and third defendants, in favour of both Koraga Chetti and first defendant, interest was payable annually to both Koraga Chetti and first defendant jointly except the interest for the last year of the term of mortgage which interest along with the principal of the mortgage debt, was payable to first defendant only. Whether the Rs. 4,000 in question belonged exclusively to first defendant or Koraga Chetti deceased, or to both jointly, the mortgage instrument operates in law as between the first defendant and Koraga Chetti as entitling both jointly to the interest payable under the mortgage bond, except the interest due for the last year of the term of the mortgage, and the first defendant alone to the said last year's interest and the principal of Rs. 4,000. Having regard to the decision of the Privy Council, *Jogeswar Narain Deo v. Ram Chund Dutt*(1), overruling the decision of this Court, *Vydimada v. Nagammal*(2), we cannot accede to the contention of the learned

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(1) L.R., 23 I.A., 37; I.L.R., 23 Cal., 670.

(2) I.L.R., 11 Mad., 258.

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pleader for the first defendant that on the death of Koraga Chetti the right to the whole interest payable yearly passed by survivorship to the first defendant. In our opinion the interest accruing due since the death of Koraga Chetti belongs under section 45 of the Contract Act to the plaintiff as the legal representative of Koraga Chetti and to the first defendant and the two will be entitled each to a moiety of the interest. The circumstance that Koraga Chetti and first defendant meant to live and were living together as husband and wife under the Aliyasantana law is not sufficient to raise the presumption of a contract that there was to be a right of succession by survivorship between them in respect of this fund of Rs. 4,000. The payment, if it be a fact, to the first defendant alone of the interest for 1897-98 after notice from the plaintiff not to pay the interest to first defendant, cannot bind the plaintiff and he is entitled to be paid his share of interest for that year, viz., Rs. 112-8-0, and both he and first defendant are jointly entitled to receive future interest and the first defendant alone the principal and the interest for the last year.

The decree will be modified by declaring that the plaintiff is entitled equally with the first defendant to the annual interest payable from 1898-99 to 1903-04 and to recover Rs. 112-8-0, as his share of interest for 1897-98. If the said amount of Rs. 112-8-0 with interest be not paid into Court by the second and third defendants on 8th February 1902, such portion only out of the mortgaged property as may be sufficient to realize the said amount, with interest till date of realization, shall be liable to be sold. The plaintiff and first defendant shall bear and pay costs proportionately both in the Original Court and in this Court. The decree appealed against is confirmed in other respects.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

SIVASAMI CHETTI AND ANOTHER (DEFENDANTS

Nos. 1 to 3), APPELLANTS,

1901
August 15,
16, 19, 22

v.

SEVUGAN CHETTI (PLAINTIFF), RESPONDENT *

Hindu Law—Proposed agreement with all members of Hindu family—Agreement not perfected—Execution of document by eldest brother upon understanding that all would join—Refusal by younger brothers to execute—Suit on document dismissed.

Plaintiff sued two brothers and the minor son of the elder of them on a hypothecation bond, which recited that it was executed by the elder on his own behalf and on behalf of his minor son, and by his two brothers (one of whom was now deceased) on their own behalf respectively. In fact, it was signed only by the eldest, for himself and for his son, the other brothers having refused to execute it when asked to do so. The defence was that no suit could be brought on the document inasmuch as it was not completed, and the younger of the two surviving brothers further contended that the loan had not been contracted for his benefit, that the eldest brother had not executed the bond on his behalf and that he had never agreed to execute it himself. The document separately named each of the three brothers as parties, they were not described as being undivided and the eldest was described as only representing his son.

Held, that the document constituted merely a proposed agreement which had never been perfected, the plaintiff having contracted and the eldest brother having executed it, upon the understanding that the two younger brothers would join in its execution, and that neither the elder nor the younger defendant was liable.

Held also, that if the parties intended that all the members of the family should execute the document it could not take effect by reason that the person who had alone executed it happened to be the managing member, and that the debt was recited to have been incurred for the benefit of the family.

SUIT for money due on a registered hypothecation bond. The following statement of facts is taken from the judgment of BHASHYAM AYYANGAR, J.:—"Plaintiff sues on a hypothecation bond, exhibit J, dated 31st October 1897, purporting to be made between the plaintiff on the one part, and the first, second and third defendants as well as one Pothu Chetti, now deceased, on the other part, and to be executed by the first defendant for himself and for the second defendant, his minor son. The third defendant

* Appeal No. 102 of 1900 against the decree of T. Varada Rao, Subordinate Judge of Madura (East), in Original Suit No. 68 of 1898.

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and the deceased Pothu Chetti are described in exhibit J as the younger brothers of the first defendant. Exhibit J recites that the first and third defendants and Pothu Chetti execute the document on their behalf respectively and the first defendant, also on behalf of the second defendant, a minor. The first defendant, on behalf of himself and the second defendant denied the execution by him of the hypothecation bond and also contended that no suit could be brought upon the bond, apparently on the ground that it was not completed. The third defendant also denied the genuineness of exhibit J and contended that the loans recited in exhibit J were not contracted for his benefit and that even if exhibit J were genuine, he was not liable to be sued thereon, inasmuch as the first defendant did not execute the same on his behalf or of the deceased Pothu Chetti and that no suit could be brought on exhibit J, as it was not completed, and neither he nor the deceased Pothu Chetti executed or agreed to execute the same. Both the first and third defendants also alleged in their written statements that the first defendant was not the managing member of the family. The Subordinate Judge found exhibit J to be genuine and that the consideration therein recited was real and binding upon the family and passed a decree in favour of the plaintiff against defendants Nos. 1, 2 and 3 and the property hypothecated under exhibit J. Against this decree, defendants Nos. 1, 2 and 3 have preferred appeal No. 102 of 1900; and it is contended on their behalf that exhibit J is not genuine, that a portion of the consideration for exhibit J is not real, and that exhibit J not having been completed, it cannot bind either the defendants Nos. 1, 2 and 3 jointly or any of them." The document (exhibit J) named each of the three brothers as a party to it, and did not describe them as undivided.

Defendants Nos 1 to 3 preferred this appeal.

Sundara Ayyar for appellants.

Sankaran Nayar and *M. R. Krishna Ayyar* for respondent.

BHASHYAM AYYANGAR, J. (after stating the facts already set out):—I concur with the Subordinate Judge in holding that exhibit J was signed by the first defendant and that the consideration for the mortgage bond, *i.e.*, Rs. 5,470 was real and such as would bind the family. Negotiations were going on for some time between the defendants and the plaintiff, in view to the plaintiff advancing a further loan and obtaining a mortgage bond

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for Rs. 10,000 from the defendants, hypothecating all their property. Owing, apparently, to disagreement as to rate of interest, the negotiations fell through, but, the plaintiff being anxious to obtain security for the various sums advanced by him on promissory notes, mainly to the first defendant, and partly to the third defendant, and the first defendant too, being desirous that the debts thus contracted by him should be undertaken by his brothers also, it was arranged between the plaintiff and the first defendant that the exhibit J should be executed by all the members of the family, which, at that time, was in an embarrassed state of circumstances. But as the remaining members of the family declined to sign exhibit J after it was signed by the first defendant, the first defendant refused to register the document so far as he was concerned by falsely denying its execution by him. The District Registrar, after being satisfied that it was executed by the first defendant, directed its registration. I am satisfied, upon the evidence in the case, that exhibit J was executed by the first defendant, and no ground has been made out for allowing the first defendant to re-open the settlement of accounts embodied in exhibit J. But, in my opinion, the appellant's contention that exhibit J was intended both by the plaintiff and the first defendant to be executed by all the members of the family, and that it was not intended that the first defendant alone, by signing it, was to bind himself, or, in his capacity as managing member, bind the whole family, is well founded. When a document is intended to be executed by several persons, but is executed only by some of them, the question whether it takes effect as against those who have executed it, notwithstanding that the rest have declined to join in the execution of the document, rests upon the intention of the parties. Without laying down as a general proposition that whenever an instrument is drawn up, making every member of an undivided Hindu family party to it by name, it will not take any effect if one or more of them do not join the rest in executing it, I am clearly of opinion that, under the circumstances of the present case, the only reasonable inference to be drawn as to the intention of the plaintiff and of the first defendant when he executed exhibit J is that it was to take effect only on the third defendant and Pothu Chetti also joining in its execution. More than one-half of the consideration for exhibit J is the amount of the unregistered hypothecation bond, exhibit D, dated 20th April 1896, which was executed not only by the first

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defendant, but also by the third defendant and Pothu Chetti. The promissory note, exhibit G, for Rs 700, which forms a portion of the consideration for exhibit J, was given only by the third defendant and Pothu Chetti and the promissory note, exhibit H, for Rs. 100—also a part of the consideration for exhibit J—was given by the third defendant only. Neither in exhibit J nor in exhibit D, nor in any of the promissory notes, is the first defendant referred to as the managing member and, in fact, not a single document has been produced which was executed by him, as representing his branch of the family. Exhibit J clearly names each of the three brothers as a party to the document and they are not even described as undivided brothers; and the first defendant is therein referred to only as representing the second defendant. If exhibit J is to be given effect to, as contended on behalf of the respondent, as a mortgage bond executed by the first defendant, as the managing member of his branch of the family, the result, so far as the first defendant is concerned, would be, that he will be personally liable for the whole debt as also his share in the property mortgaged, and the shares of the brothers will also be liable only if the consideration for exhibit J is proved to have been incurred for purposes beneficial to the family. If the brothers also join as party executants, the creditor will be entitled to recover the debt from all the brothers, jointly and severally, without having to establish that the debt was incurred for family purposes, and in case the debt be recovered from the first defendant alone, he will be entitled to contribution from his brothers. In the present case, the plaintiff advanced but a trivial sum, at the time when exhibit J was executed, as a part of the consideration for the mortgage bond. After it was signed by the first defendant, both he and the plaintiff, endeavoured their best, but in vain, to prevail upon the third defendant and Pothu Chetti to execute the document. Under all these circumstances, it will be unreasonable to conclude that the first defendant, when he executed exhibit J intended to bind himself or his brothers, if they did not execute the document. In my opinion exhibit J simply amounts to a proposed agreement, which was never perfected; the plaintiff himself contracted on the faith that the brothers would join and the first defendant executed the document, upon the understanding that his brothers also would join in executing the same.

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The principle of law applicable to the case is clearly laid down in *Latch v. Wedlake*(1). In that case, it was held by Lord Denman, C.J., that, notwithstanding that the contracting parties, were three partners, any one of whom, alone, could by his contract bind the rest, yet the question must have been submitted to the jury,—Whether the second defendants by their executing the instrument intended that the third partner should be bound, though he did not join in the execution, or, at all events, they intended to make themselves liable on the instrument, and whether the intention of all the parties was not that the third partner should also be an actual party to the agreement. If one intends to be a joint and several obligee or only a joint obligee with others there is a right of contribution against his co-obligees, if his intention be carried out, but if he becomes a mere several obligee, he has no right of contribution (*Underhill v. Horwood*(2)). It is contended, on behalf of the respondent, that there is a recital in exhibit J that the debts mentioned therein, were incurred for meeting the expenses of suits and for family expenses; and that the document should therefore be treated, as executed by the first defendant as managing member of the family. If the parties intended that all the members of the family should execute the document, it cannot take effect by reason that the person who alone executed the document happens to be the managing member and that the debt is recited to have been incurred for the benefit of the family.

Moreover, in the present case, the recital in exhibit J that the debt was contracted for the benefit of the family, may be referred to the circumstance that one of the parties to the instrument, viz, the second defendant, was a minor.

In *Charlton v. Earl of Durham*(3), which was cited on behalf of the respondent, all that was held was that if a discharge purports to be signed by the two executors and the debtor intended to have the receipts of both, the discharge will be valid, notwithstanding that the signature of one of the executors was not genuine, and that the receipt of one executor would operate as a valid discharge. The principle of that case is clearly inapplicable to a case like the one under consideration.*

It has not been contended, on behalf of the respondent, that though effect may not be given to exhibit J, as a mortgage bond

(1) 11 A. & E., 959.

(2) 10 Ves. Jun., 209 at p. 226.

(3) L.R., 4 Ch. App., 433.

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executed by first defendant as managing member of the family, yet effect should be given to it as against the first defendant personally and his share in the property hypothecated under it. I need hardly say that in the view which I have taken of exhibit J, viz., that it was simply a proposed agreement which was never perfected, such contention would be untenable.

I would therefore allow the appeal and dismiss the plaintiff's suit with costs throughout.

BENSON, J.—I concur.

APPELLATE CIVIL.

*Before Mr. Justice Davies and Mr. Justice Bhashyam
Ayyangar.*

1901.
August
28, 30.

MUTHAYYA RAJAGOPALA THEVAR (PLAINTIFF),
APPELLANT,

v.

MINAKSHI SUNDARA NACHIAR AND OTHERS
(DEFENDANTS), RESPONDENTS. *

Hindu Law—Impartible estate—Adoption—Rights of natural father of adopted son as reversionary heir to son's estate.

The first defendant in this suit was the adoptive mother of N, who died. N was the last holder of an impartible zamindari, and on his decease, first defendant enjoyed the estate. Plaintiff now sued for a declaration that he was entitled to the estate as reversioner, in preference to a senior brother of the first defendant, basing his claim principally on the ground that he was the natural father of N:

Held, that this relationship did not entitle plaintiff to claim as reversionary heir. In determining the degree of propinquity to the deceased adopted son in his adoptive family, in which the question of reversionary succession arose, a claimant should not be regarded as next of kin because of his relationship as natural father, which, for purposes of inheritance, is immaterial. An adopted son is, for mutual rights of succession, completely severed from his family.

Srinivasa Ayyangar v. Kuppan Ayyangar, (1 M.H.C.R., 180), followed.

As to whether such natural relationship would be efficacious to intercept an escheat to the Crown.—*Quære*.

SUIT for a declaration of plaintiff's right as reversioner to the estate of N deceased, after the death of first defendant, the

* Appeal No. 177 of 1900 against the decree of B. Cammaran Nayar, Additional Subordinate Judge of Tinnevely, in Original Suit No. 14 of 1900 (Original Suit No. 76 of 1899 on the file of the Subordinate Judge of Tinnevely).

adoptive mother of N, and that certain alienations recently made by first defendant were invalid. The estate in question was an impartible zamin, governed by the law of primogeniture. Plaintiff was the natural father of N, and based his claim on that ground and on the alternative one that he was also the brother of the adoptive mother of N. After the decease of N in 1891, the estate had been enjoyed by first defendant. Plaintiff claimed that there were no nearer heirs than himself. The defence was that plaintiff was not entitled to the estate or to question the alienations and further that he was not entitled as brother to the first defendant inasmuch as his elder brother was alive, and that the fact that plaintiff was the natural father of N did not make him heir under the Hindu law.

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The Subordinate Judge found against the plaintiff on the issue whether he was the next reversionary heir to the zamin, and dismissed the suit.

Plaintiff preferred this appeal.

Sankaran Nayar, T. Rangachariar and Sivarama Ayyar for appellant.

V. C. Desikachariar, Balamukunda Ayyar and Jagannatha Ayyar for respondents.

JUDGMENT.—The question argued in support of this appeal is that the appellant who is a junior adoptive maternal uncle of the deceased adopted son of the first defendant is a preferential reversionary heir to his senior brother by reason of his being the natural father of the deceased adopted son, the estate in question being admittedly an impartible estate governed by the law of primogeniture. In illustration of this contention it was maintained that if the property had been partible, the appellant would be entitled to the whole of it to the exclusion of his brothers. We consider the contention to be untenable. We cannot accede to the argument that, in determining the degree of propinquity to the deceased adopted son in his adoptive family in which the question of reversionary succession arises, the appellant should be regarded as nearer of kin, because of his relationship as natural father—a relationship which for purposes of inheritance is entirely immaterial. It has been definitely decided in *Srinivasa Ayyangar v. Kuppan Ayyangar*(1) that for mutual rights of succession an

(1) 1 M.H.C.R., 180.

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adopted son is completely severed from his natural family. None of the texts quoted to us is in conflict with that ruling.

It is unnecessary to consider or decide whether the natural relationship would be efficacious to intercept an escheat to the Crown.

The appeal, therefore, fails and is dismissed with separate costs for each set of respondents except in regard to the vakil's fee of which each will get a moiety

APPELLATE CIVIL.

Before Mr Justice Benson and Mr. Justice Moore.

1901
August 30

SRIRAMULU (PLAINTIFF), APPELLANT,

v.

CHINNA VENKATASAMI (DEFENDANT), RESPONDENT *

Limitation Act—Act XV of 1877 sched II, arts 62 and 97—Assignment of mortgage over immoveable property by unregistered document—Receipt by assignor of mortgage amount in hand of assignee—Suit by assignee against assignor within three years of receipt mortgage money

By an agreement in writing, but not registered, bearing date 21st August 1895, defendant assigned a mortgage over certain lands to plaintiff for a consideration which was duly paid. In 1898, the mortgagee brought a suit against plaintiff and defendant to redeem the mortgage and to recover possession of the property, and a decree was passed on 15th October of that year, in which the Court refused to recognise plaintiff's title because of the non-registration of the assignment. Defendant thereupon received the mortgage amount as mortgagee from the mortgagee. Within three years of the said receipt by defendant of the mortgage amount, plaintiff brought this suit to recover from defendant the sum paid as consideration for the transfer of the mortgage in 1895. Upon the defence of limitation being raised

Held, that the suit was not barred. Defendant by receiving the mortgage amount from the mortgagee, in fraud of plaintiff's right, received it for plaintiff's use. The suit was therefore governed by article 62 of schedule II to the Limitation Act and was not barred inasmuch as it had been instituted within three years of the receipt of the money by defendant. Moreover, as possession of the

* Second Appeal No 154 of 1900 against the decree of M D Bell, District Judge of Vizagapatam, in Appeal Suit No 235 of 1899, affirming the decree of C. Bapayya Pantulu, District Munsif of Vizagapatam, in Original Suit No 171 of 1899.

mortgaged land had been given, under the document of 1895, to plaintiff and held by him until its redemption by the mortgagor, there was consideration at the time when the assignment was made, and that consideration afterwards failed. Inasmuch as the suit had been brought within three years of the date of the failure of consideration, article 97 would apply and the suit would not be barred.

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Suit to recover the principal and interest alleged to be due to plaintiff under an agreement, as witnessed by an unregistered document. Plaintiff and defendant were brothers, and in a previous partition of their property with their father, plaintiff acted as guardian of defendant, who was then a minor. Amongst other property that fell to the defendant's share was a mortgage on lands. This mortgage, defendant, on attaining his majority, agreed to assign to plaintiff, in consideration of a payment by plaintiff of a certain sum of money. The agreement was reduced to writing in the form of a purni, or letter, which purported to transfer the mortgage to plaintiff, but which was never registered. Plaintiff paid the agreed sum to defendant and obtained a receipt. Both letter and receipt bore date 21st August 1895. Plaintiff was also put into possession of the mortgaged property and of the deed of mortgage. In 1898, the mortgagor brought a suit against the present plaintiff and defendant to redeem the mortgage and to recover possession of the property. The Court granted a decree against the present plaintiff, holding that, inasmuch as the letter of 21st August 1895, which purported to transfer the mortgage to plaintiff, had not been registered, it was inoperative and plaintiff had no title. That decree was passed on 15th October 1898. Defendant, as mortgagee, received the mortgage money from the mortgagor. Plaintiff now sued defendant for the amount paid to him in consideration of the assignment of the mortgage, claiming that the cause of action had arisen at the date on which the last-mentioned decree had been passed. The suit was instituted within three years of the receipt of the mortgage amount by defendant from the mortgagor. There was no defence on the merits, but defendant pleaded that the claim was barred by limitation. The Munsif upheld this plea. He considered that the cause of action was based on the document of 21st August 1895 and not on the decree of 1898, and dismissed the suit.

The plaintiff appealed to the District Judge who said:—"The Munsif has dismissed the suit on the ground that it was barred by limitation. The question is whether article 62 or 97 of the

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Limitation Act applies. I am clearly of opinion that the Munsif was right in applying article 62. In the present case as in *Hanuman Kamut v. Hanuman Mandur*(1) there was no subsequent failure of the consideration upon which the money was paid, but the consideration was void from the beginning. The present suit is based on the puroni and the time of limitation begins from the date on which the money was paid." He dismissed the appeal.

Plaintiff preferred this second appeal.

V. Krishnasami Ayyar for appellant.

V. Ramesam for respondent.

JUDGMENT.—We think that the Courts below were in error in having dismissed the plaintiff's suit as barred by limitation. No doubt the mortgage assignment, dated 21st August 1895, executed by the defendant to the plaintiff, being unregistered, could not affect the mortgaged property. It was inoperative as regards the land mortgaged as security for the debt, but it was not inoperative as an assignment of the debt itself; *Jagappa v. Latchappa*(2); *Gomaji v. Subbarayappa*(3); and *Subramaniam v. Perumal Reddi*(4).

Whether the defendant in fraud of the plaintiff's right received the money from the mortgagor, he must be regarded as having received it for the plaintiff's use. In this view the suit would fall under article 62 of the Limitation Act, and was not barred since it was brought within three years of the receipt of the money by the defendant. Moreover, under the instrument of the 21st August 1895, possession of the mortgaged land passed from the defendant to the plaintiff who enjoyed the usufruct until the mortgagor, having paid the mortgage money to the defendant, recovered the land from plaintiff. There was, therefore, consideration at the time when the assignment was made and that consideration afterwards failed. In this view article 97 of schedule 2 of the Limitation Act would seem to be applicable and the suit regarded as one to recover money paid on an existing consideration which afterwards failed would not be barred, for it was brought within three years from the date of the failure of consideration.

(1) I.L.R., 15 Calc., 51.

(3) I.L.R., 15 Mad., 253.

(2) I.L.R., 5 Mad., 119.

(4) I.L.R., 18 Mad., 454.

In any view, therefore, the suit was not barred. There is no defence on the merits. We must therefore set aside the decrees of the Courts below and, allowing the appeal, give plaintiff a decree for the sum sued for with costs throughout. Interest will be allowed from date of plaint at six per cent. per annum.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

CHENNU MENON AND OTHERS (DEFENDANTS Nos. 2, 3, 6, 7, 9
AND 10), APPELLANTS,

1901.
September
13.

v.

KRISHNAN AND OTHERS (PLAINTIFF AND DEFENDANTS Nos.
4, 5, 8, 11, 13, AND 18 TO 24), RESPONDENTS.*

*Civil Procedure Code—Act XIV of 1882, s. 30—Leave to sue given after commence-
ment of action—Previous refusal—Validity of suit.*

Leave to sue under section 30 of the Code of Civil Procedure need not necessarily precede the commencement of the suit, but may be given after it has commenced. Where leave has been so given, it is immaterial that an application for permission to sue has been previously refused.

SUIT to recover certain property with arrears of rent. Plaintiff sued as the present manager of the Cherupalangat samuham of which defendants Nos. 18 to 23 were also members. The property claimed belonged to the samuham, and had been demised on kanom by a former manager of the samuham to the karnavan of defendants Nos. 1 to 17. The defence was raised that plaintiff had no right to sue, and that as there were more than fifty members in the samuham, the suit was opposed to section 30 of the Code of Civil Procedure. Leave to sue under section 30 was thereupon obtained during the course of the case. The seventh issue was as follows:—"Whether there are other members in the samuham not brought in as parties to the suit and if so, whether the suit is

* Second Appeal No. 326 of 1900 against the decree of K. Krishna Rao, Subordinate Judge of Calicut, in Appeal Suit No. 161 of 1899, affirming the decree of V. Rama Sastri, District Munsif of Betutnad, in Original Suit No. 335 of 1897.

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not liable to be dismissed for not obtaining permission to sue under section 30 of the Code of Civil Procedure?" With regard to this issue the Munsif said:—"The defendants raised the preliminary objection that there were other members of the samuham than the plaintiff and the defendants Nos. 18 to 23 and that the suit was liable to be dismissed for plaintiff's failure to obtain permission to sue on behalf of the samuham under section 30 of the Civil Procedure Code. I held an enquiry as to who were members of it. But to avoid all further dispute on the matter, the plaintiff's vakil applied to the Court for permission to sue on behalf of the samuham and obtained it. It is true the permission was obtained after the filing of the suit and not before. The ruling in *The Oriental Bank Corporation v. Gobind Lall Seal*(1) does not seem to be an authority any longer. The ruling in *Fernandez v. Rodrigues*(2) recognizes that permission to sue under section 30 of the Civil Procedure Code may be obtained even after the filing of the suit. Even assuming, as the defendants state, that there are other persons not parties to the suit who are members of this samuham, the plaintiff's suit is perfectly maintainable in its present form." He ordered the defendants to surrender the property to the plaintiff and defendants Nos. 1 to 17 to pay the arrears of rent.

On appeal, by most of the defendants Nos. 1 to 17, the Subordinate Judge said:—"The first question for decision is whether the proceedings taken in the lower Court under section 30 of the Code of Civil Procedure were irregular. I am of opinion that they were not. That there were other members of the samuham besides the plaintiff and defendants Nos. 18 to 23 is clear from exhibits IV, V and VI and although the plaintiff had in his plaint stated the contrary, he afterwards seems to have recognized his error and applied for issue of a public notice under section 30 (Miscellaneous Petition No. 1658 of 1897). The District Munsif at first rejected the plaintiff's application. The order being wrong, plaintiff again asked for a public notice and that was granted, the District Munsif directing that 'the fact was to be proclaimed by notice and by beat of drum in the vicinity of Kotikunnath temple.' The record shows that this proclamation was duly

(1) I.L.R., 9 Cal., 604.

(2) I.L.R., 21 Bom., 784.

effected. That all this was made, not in the earlier stage of the suit but shortly before its disposal does not render the decision any less effectual, and the authority quoted by the Munsif. (*Fernandez v. Rodrigues*(1)) is applicable to the case." He dismissed the appeal.

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Defendants Nos. 2, 3, 6, 7, 9 and 10 preferred this second appeal.

J. L. Rosario and *Appu Nedungadi* for appellants.

Sundara Ayyar for respondent No. 1.

JUDGMENT.—The appellant contends that the leave to sue given under section 30 of the Code of Civil Procedure is irregular and therefore the suit should be dismissed.

The plaintiff who is the manager of a samuham applied for leave to sue the defendants Nos. 1 to 12 on behalf of the samuham to recover certain property. This was refused. The plaintiff thereupon filed the suit in his own name and claimed to recover as manager of the samuham joining other members of the samuham as defendants also. The defendants raised the question as to whether all the members of the samuham were made parties and also contended that the suit would not lie as leave to sue under section 30 had not been given.

The Munsif in the course of the case gave leave to sue under section 30 and ultimately the plaintiff succeeded in both Courts.

The only question before us is whether the leave given is valid and sufficient to entitle the plaintiff to a decree, the leave having been given (a) after suit commenced and (b) after leave had been refused.

So far as we have been able to discover there is no decision of this Court directly in point upon either question, but the decision of Shephard, J., in *Srinivasa Chariar v. Raghava Chariar*(2) goes to show that in his opinion the leave to sue need not necessarily precede the commencement of the action.

In *Fernandez v. Rodrigues*(1) and *Baldeo Bharthi v. Bir Gir*(3) those Courts hold that leave may be given after the suit has commenced, and we also are of that opinion. We are also of opinion that the fact that leave had previously been refused does not affect the matter as it is entirely a matter of discretion not

(1) I.L.R., 21 Bom., 784.

(2) I.L.R., 23 Mad., 28.

(3) I.L.R., 22 All., 269.

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affecting the merits of the case and it can only have affected the defendants in the matter of costs which could be dealt with at the time the order was made.

We therefore dismiss this second appeal with costs.

APPELLATE CIVIL.

*Before Sir Arnold White, Chief Justice, and Mr. Justice
Bhashyam Ayyangar.*

WATSON AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

LLOYD (DEFENDANT), RESPONDENT.*

1901.
September
25.

*Army Act (1881) -14 & 15 Vict., cap. 58, ss. 136, 151—Army (Annual) Act (1895)
58 Vict., cap. 7 s. 1 Civil Procedure Code—Act XIV of 1892, ss. 2, 206
Public officer—Attachment of moiety of pay of officer of Indian Staff Corps.*

The effect of section 136 of the Army Act 1881, as amended by section 4 of the Army (Annual) Act 1895, is to empower the Civil Courts to attach one moiety of the salary of an officer in the Indian Staff Corps, under section 206, proviso (1) of the Code of Civil Procedure.

Calcutta Trades Association v. England, (11 L.R., 21 Cal., 102) followed.

APPLICATION in execution to attach a moiety of an officer's salary. An *ex parte* decree was obtained against the defendant on 26th June 1900, which was transferred to Madras in December of the same year. The prayer in the petition was as follows:—
“By attachment of one moiety of the defendant's salary and allowances as Major in the 19th Regiment of Madras Infantry stationed at Madras, such attachment to be served on the Officer Commanding the Regiment.” The defendant did not appear.

The learned Judge, sitting on the original side, refused the application in the following order:—“I think this application should be refused. It seems to me that section 206 of the Civil Procedure Code does not authorise the attachment of the salary of

* Original Side Appeal No. 7 of 1901 against the decree of Mr. Justice Boddam dismissing the application by the appellants under section 206 of the Code of Civil Procedure, for attachment of a moiety of salary of respondent in execution of the decree in Original Suit No. 180 of 1900 on the file of the Bombay High Court.

an officer. The proviso to that section shows that it was not intended by the section to effect, add to or alter the law in force under the Army Act or similar law in force for the time being. At the time the section was passed there was a power by section 151 of the Army Act to attach half the salary of all officers and there could be no object in giving that power over again and, in my opinion, the proviso shows that there was no intention in any way to interfere with the law applicable to the pay of officers whether of the Staff Corps or of the regular forces. That was the state of the law in 1895. By the Army (Annual) Act of 1895, section 151 was repealed so that the salary of officers thenceforth ceased to be attachable, but to section 136 was added a paragraph which, it is contended, makes a law which was never intended to affect the Army Act for the time being in force, have that effect. I do not think it has any such effect unless the Civil Procedure Code, by section 266, does affect the Army Act in force. At present the salary of an officer cannot be attached and the proviso to the section says it shall not affect it. I am of opinion therefore that the contention relied on is wrong and that it never was the intention of the Legislature by adding the words 'or by any law passed by the Governor-General of India in Council' to make section 266 applicable to officers, though the interpretation clause, apart from the proviso to this section, does include in the word 'public officers,' officers serving the Government of India. Apart from the proviso this might well be so but in the face of it, I do not think it is so."

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Plaintiffs preferred this appeal

Hon. Mr. *Eardley Norton* for appellants — The application is made under section 230 of the Code of Civil Procedure for the attachment of a portion of the salary of an officer, a Major in the Indian Staff Corps. The salary appears to be paid under an Act of the Government of India. Relief is sought under section 266, sub-section (2) of which does not apply to British officers in native regiments. The effect of the proviso to section 266, taken as a whole, is that any article or property not specifically exempted from attachment by it is liable, under the section, to attachment and sale. [He referred to section 266, sub-section (1), and section 268.] The salary amounts to about Rs. 700 a month, and if the officer falls within the definition of a "public officer," it is submitted that his salary is attachable. The term

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"public officer" includes "every Commissioned officer, while serving under Government," and "Government" includes Government of India as well as the local Government—(see the last clause of section 2 of the Code of Civil Procedure. This officer is therefore a Commissioned officer, serving under Government, and paid from the Indian Exchequer. [He referred to *Calcutta Trades Association v. Ryland*(1).] The last proviso of section 266 of the Code of Civil Procedure refers to the Army Act of 1881, so that if there is anything in the latter Act which conflicts with the Code, it must be conceded that the Code would not govern the case. But sections 136 and 151 of the Army Act of 1881 (44 & 45 Vict., cap 58), are not in conflict with the Code. The amending Act of 1895 (58 Vict., cap 7) contains two amendments. It repeals section 151 of the Act of 1881, and by section 1, amends section 136 of the older Act by providing that the pay of an officer shall be paid without any deduction other than deductions authorized by that Act itself "or by any law passed by the Governor-General of India in Council." That means already passed or to be passed, and section 136, thus amended, must include the Code of Civil Procedure, and as this latter Act is incorporated in the Army Act, there is no further need for section 151, which is accordingly repealed. [SIR ARNOLD WHITE, C.J.—It is significant that section 151 was repealed by the same Act that amended section 136, and incorporated the Code of Civil Procedure.] *Vinayagava v. Ramudu*(2) was not a case of an officer and it was decided prior to the amendment, but the Judges in effect applied the principle now contended for.

The respondent was not represented.

JUDGMENT—This is an appeal from an order of Boddam, J., dismissing an application for the attachment of a moiety of the pay of a Major in the Indian Staff Corps.

The Army Act of 1881, section 151 (3) provided:—"A Civil Court or Court of Small Causes, upon adjudging payment of any sum by any person subject to military law other than a soldier of the regular forces, may either award execution thereof generally, or may direct specially that the amount named in the direction, being the whole or any part of the said sum, shall be paid by instalments or otherwise out of any pay or other public money

(1) I.L.R., 24 Calc., 102.

(2) I.L.R., 9 Mad., 170.

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payable to the debtor, and the amount named in the direction, not exceeding one half of such pay and public money, shall, while the debtor is in India, be stopped and paid in conformity with the direction."

Section 136, of the same Act provides—"The pay of an officer or soldier of His Majesty's regular forces shall be paid without any deduction other than the deductions authorized by this or any other Act or by any royal warrant for the time being."

In 1895, section 151 of the Army Act of 1881 was repealed and the words "or by any law passed by the Governor-General of India in Council" were added to section 136.

Section 266 of the Code of Civil Procedure provides that the following particulars, *inter alia*, shall not be liable to attachment "the salary of a public officer or of any servant of a Railway Company or local authority to the extent of (1) the whole of the salary where the salary does not exceed twenty rupees monthly; (2) twenty rupees monthly where the salary exceeds twenty rupees and does not exceed forty rupees monthly; and (3) one moiety of the salary in any other case." Section 2 of the Code defines "public officer" as including "every Commissioned officer in the military or naval forces of His Majesty while serving under Government" and defines "Government" as including the Government of India as well as the local Government.

There can be no question that the defendant in the present case is a "public officer" within the meaning of the Code of Civil Procedure.

The learned Judge dismissed the application for attachment because he was of opinion that it was not the intention of the Legislature by adding the words "or by any law passed by the Governor-General of India in Council" to section 136 of the Army Act to make section 266 of the Code of Civil Procedure applicable to a military officer.

In considering the construction to be placed upon these words it is important to bear in mind that they were added to section 136 by the statute (the Act of 1895) which repealed section 151 *in toto*. They would appear to be consequential on the repeal of section 151, and the Legislature in adding the words would seem to have had in view the fact that the provisions of the repealed proviso to section 151, were substantially the same as the provisions of the Indian Procedure Code, sections 266-268.

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We think the case of *Calcutta Trades Association v. Ryland*(1) was rightly decided and we are prepared to follow that case

We accordingly allow the appeal with costs and make an order attaching one moiety of the pay of the judgment-debtor.

Messrs. Barclay, Orr & David—Attorneys for appellants.

Messrs. Short & Roll—Attorneys for respondent.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Bhaskaram Ayyangar.

1901.
September
23, 24.
October
1, 9.

PUNINTHAVELU MUDALIAR (PLAINTIFF), APPELLANT,

v.

BIASHYAM AYYANGAR AND ANOTHER (DEBENDANT AND HIS
LEGAL REPRESENTATIVE), RESPONDENTS.*

*Letters Patent, art. 15 "Judgment" Appeal—Insolvent Debtors Act—11 § 12
Fict., cap. 21 s. 23—Reported ownership—Charge on debts Civil Procedure
Code—Act VII of 1852, s. 572—Devolution of interest of judgment-debtor upon
Official Assignee.*

An order dismissing an application by a judgment-creditor of an insolvent for a sum of money in the hands of the Official Assignee to be paid by the Official Assignee to the judgment-creditor, is a "judgment" within the meaning of article 15 of the Letters Patent, and an appeal lies therefrom.

In March 1897, B covenanted to repay by instalments a sum of money owing by him to plaintiff, and mortgaged his stock-in-trade and all outstandings and moneys then due and owing and thereafter to become due and payable to him. B remained in possession. In July 1899 plaintiff sued B on the mortgage-deed. In August 1899, upon an *ex-parte* application by the plaintiff, an order by way of injunction was made in the suit restraining the mortgagor from disposing of the stock-in-trade and outstandings and debts payable to him. This injunction was subsequently dissolved. In the same month plaintiff gave notice to a person indebted to B that plaintiff claimed the amount of the debt under his mortgage. In September 1899 B was adjudged an insolvent and the usual vesting order was made. In October 1899, plaintiff obtained a decree in his suit, by which it was ordered that B should pay the principal and interest due under the mortgage-deed

(1) I.L.R., 24 Calc., 102.

* Original Side Appeal No. 2 of 1901 against the decree of Mr. Justice Boddam in Civil Suit No. 143 of 1899.

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and that in default of payment the mortgaged premises should be sold. In February 1900 the person indebted to B paid the amount of his debt to the Official Assignee. In September 1900, an order was made in plaintiff's suit against the insolvent directing that the decree should be executed by the attachment of the money in the hands of the Official Assignee. In December 1900, plaintiff applied by summons in his suit against the insolvent for an order that the Official Assignee should pay over that money.

Held, that plaintiff was not entitled to the order. The decree, as a mortgage decree directing the sale of the chattels, including the debt in question, was void and inoperative as against the Official Assignee inasmuch as the whole right, title and interest of the defendant devolved by operation of law upon the Official Assignee during the pendency of the suit and before the decree had been passed. Nor was the position of the Official Assignee affected by the doctrine of *lis pendens*. The party seeking to bind him by the result of the suit (pending which the interest in its subject-matter had devolved upon the Official Assignee by operation of law) should have applied under section 372 of the Code of Civil Procedure to have him joined as a party to the suit. *Miller v. Budh Singh Dudhuria* (I.L.R., 18 Cal., 13), referred to.

Where a debtor has assigned a debt, notice by the assignee to the person owing the debt will take it out of the order or disposition of the debtor.

Per SIR ARNOLD WHITE, C.J.—A chose in action if it is a debt due to the insolvent in his trade or business, comes within the words 'goods and chattels' as contained in section 23 of the Indian Insolvent Debtors' Act.

Per BHASHYAM AYYANGAR, J.—The instrument only created a charge or hypothecation in plaintiff's favour, but a charge-holder is as much the substantial owner of and has as substantial an interest in the goods and chattels as a mortgagee thereof, and if either allows the mortgagor or the person creating the charge to remain in possession, under circumstances which will lead to his being the reputed owner and to his being enabled to command credit thereby, he will be estopped from asserting his substantial interest or ownership in the property as against the Official Assignee. A debt is taken out of the order and disposition of an insolvent if a suit be brought to enforce a charge upon the debt prior to his adjudication.

SUIT on a mortgage-bond. The facts necessary for the purposes of this report are fully set out in the judgments. Plaintiff applied that a sum of Rs. 4,000 in the hands of the Official Assignee to the credit of the defendant, an insolvent debtor, might be paid out to him. The application was dismissed.

Plaintiff preferred this appeal.

V. Krishnasami Ayyar, for appellant, contended that the debt was not in the order or disposition of the insolvent. The latter was not in possession with the plaintiff's consent. Even assuming the instrument of March 1897 to be an assignment by way of mortgage and not a mere charge, plaintiff could reduce it into possession by giving notice. The basis of the doctrine of reputed

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ownership is the laches of the true owner in permitting the chattel to remain in the possession of the debtor (*Belcher v. Bellamy*(1)). A mere verbal mention of an assignment was held to be sufficient to take a policy of assurance out of the reputed ownership of the assured in *Allison v. Chester*(2). See also *In re Wright*(3). He contended that plaintiff was neither a legal or an equitable mortgagee; but was merely a charge-holder and as such had no right to demand possession of the chattel; consequently, there was no laches on his part in permitting the insolvent to remain in possession. The case was different to that in which a mortgagee has the right to possession in law, but permits the debtor to remain in possession by contract. He referred to *In re Seaman*(4), *In re Hunt, Monnet, & Co v. Bholay Mangru*(5), *In the matter of C. M. J. Donaghue*(6), *Milner v. Budh Singh Dudhuria*(7), and contended that it was not necessary for the Official Assignee to be made a party where the action is *in personam*.

The Official Assignee (*Mr. J. G. Kernan*), in person, contended that the Court had no power to make an order against him unless in a suit to which he was a party and that he was entitled to the protection given by Courts to receivers, and cited *J. Kahn v. Ali Mahomed Haji Umar*(8), *Mahomed Zohuruddin v. Mahomed Nooruddin*(9), also *Prout v. Gregory*(10), *Spence v. Coleman*(11), *Dawson v. Mulloy*(12). Under the provisions of the Civil Procedure Code, section, 372, the plaintiff should have had the Official Assignee added as a party to his suit. The words "true owner" which occur in the Bankruptcy Acts, and in section 23 of 11 & 12 Viet., cap. XXI, have been held to include a creditor having a legal or equitable charge upon goods left by their consent in the order or disposition of a Bankrupt—see *Ryall v. Rowles*(13), *Joy v. Campbell*(14). The plaintiff's document should be construed as a contract to assign, *Collyer v. Isaacs*(15), and did not create a lien on the money.

(1) 17 L. J., Ex., 219

(3) L. R., 3 Ch. D. 70.

(5) 1 Bom. H. C. R., (A. C. J.), 251

(7) 1 L. R., 18 Cal., 13

(9) 1 L. R., 21 Cal., 55.

(11) [1901] 2 K. B., 199

(13) 1 Ves., 315, 1 W. & T. L. C., Lq. 96

(14) 1 Sch. & L., 328, 2 W. & T. L. C., 679

(15) L. R., 19 Ch. D., 312.

(2) L. R. 10 C. P. 313

(4) [1896] 1 Q. B., 112.

(6) 1 L. R., 19 Bom., 232

(8) 1 L. R., 16 Bom., 577

(10) L. R., 24 Q. B. D., 281.

(12) H. Rep., 1 C. L., 207.

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V. Krishnasami Ayyar, in reply, contended that there was no *lis pendens* with regard to chattels, and that the doctrine only applied to immoveable property or to chattel interests in land. He referred to *Wigram v. Buckley* (1), but submitted that it was doubtful whether that decision applied in India having regard to section 276 of the Code

The Court delivered the following judgments. —

SIR ARNOLD WHITF, C.J.—This is an appeal from an order of Boddam, J., dismissing an application by a judgment-creditor of an insolvent for an order that a sum of Rs 3,400 in the hands of the Official Assignee should be paid by the Official Assignee to the judgment-creditor (the appellant)

A preliminary objection was taken by the Official Assignee that no appeal lay from the order of the learned Judge. I think the order is a "Judgment" within the meaning of article 15 of the Letters Patent and that the preliminary objection should be overruled.

The facts are these By an instrument, dated March 13th, 1897, one C. Bhashyam Ayyangar, who was afterwards adjudged an insolvent, in consideration of a sum of Rs. 5,600 found due from him to the appellant on a settlement of accounts, covenanted to repay this sum to the appellant in quarterly instalments and mortgaged to the appellant his stock-in-trade and all outstandings and moneys then due and owing and thereafter to become due and payable to the mortgagor. The deed also provided that so long as the principal and interest remained unpaid the mortgagee should be permitted to inspect the books of account and other stock and effects and property of the mortgagor The mortgagor remained in possession

On July 25th, 1899, the appellant brought a suit (143 of 1899) against Bhashyam Ayyangar on his mortgage-deed In August 1899, upon an *ex-parte* application by the appellant, an order by way of injunction was made in the suit restraining the mortgagor from disposing of the stock-in-trade and outstandings and debts payable to him. This injunction was afterwards dissolved. In the same month the appellant gave notice to Mr. Nelson, who was indebted to the mortgagor in the sum of Rs. 4,000 that he, the

(1) [1894] 3 Ch. 453.

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appellant, claimed this sum under the mortgage as an outstanding due to the mortgagor

On September 18th, 1899, C. Bhashyam Ayyangar was adjudged an insolvent and the usual vesting order was made.

On October 31st, 1899, the appellant obtained a decree in his suit by which the insolvent was directed to pay to him the principal and interest due under the mortgage-deed, and in default of payment before January 31st, 1900, the mortgaged premises were ordered to be sold.

On February 6th, 1900, the sum of Rs. 3,400 referred to above was paid to the Official Assignee by Mr. Nelson, being a sum which had become due to the insolvent for goods supplied by him to Mr. Nelson as Principal of the Law College prior to Bhashyam Ayyangar's insolvency.

On September 25th, 1900, an order was made in Suit No. 143 of 1899 directing that the decree should be executed by the attachment of the Rs. 4,000 in the hands of the Official Assignee. On December 7th, the appellant applied by summons in Suit No. 143 of 1899 for an order that the Official Assignee should pay over to the appellant this sum of Rs. 3,100. The learned Judge declined to make the order. I think he was right. I do not agree with the view of the learned Judge that the case came within section 23 of the Insolvency Act. At the time of the insolvency the property in, and the possession of, the articles of furniture sold by the insolvent to Mr. Nelson had passed to Mr. Nelson. No question of reputed ownership, therefore, arises with reference to the actual goods. The question of reputed ownership arises in connection with the debt due from Mr. Nelson to the insolvent. It would seem that under the English Bankruptcy enactments prior to the Act of 1869, all choses in action were deemed to be included in the words "goods and chattels" (*Ryall v. Rowles*(1)). The English Act of 1869 provided [section 15 (b)] that things in action other than debts due to the bankrupt in his trade or business were not goods and chattels within the meaning of the reputed ownership section and this provision was re-produced in the Act of 1883. It seems quite clear that a chose in action, if it is a debt due to the insolvent in his trade or business comes within the words "goods and chattels" as contained in the Indian Enactments. Section 23

(1) 1 Ves., 348, 1 W. & T L.C., Eq., 96.

of the Indian Insolvency Act, 1848, is in substantially the same terms as section 125 of the English Act of 1849 (12 & 13 Vict., cap. 106) except that, under the English Act, the reputed ownership section empowered the Court to order that the property should be sold and disposed of for the benefit of the creditors under the bankruptcy, whilst under the Indian enactment property to which the reputed ownership section applies is to be deemed to be the property of the insolvent and vests in the Official Assignee by operation of section 7 of that enactment. In this respect the effect of section 7 seems to be the same as that of section 17 of the English Act of 1869 and of sections 20 and 44 of the English Act of 1883.

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The doctrine of reputed ownership does not of course apply unless there is a real owner distinct from the apparent owner (*Hamilton v. Bell*(1); *Reynolds v. Bowley*(2)). For the purposes of the section the "true owner" is the person who is entitled to determine the appearance of beneficial interest. It is not necessary that he should be an assignee in law. An equitable mortgagee is the "true owner," to the extent of his interest (*Ex parte Union Bank of Manchester*(3)). It seems to me that the instrument in question in the present case does nothing more than create a charge on future debts in favour of the appellant, that it does not amount to an equitable assignment of the debts, and that the equitable interest of the appellant in the debt is not such as to constitute him the true owner within the meaning of the section. The instrument does not operate as an assignment either in law or in equity. I am not prepared to say, in the absence of express authority, that the doctrine of reputed ownership can apply in the case of a "charge" on future debts such as that created by the instrument in question in the present case. In my opinion C. Bhashyam Ayyangar was himself the "true owner" of the debt subject to the equities created by the charge in favour of the appellant, and if this be the true view, the doctrine of reputed ownership can have no application. Assuming I am wrong in this view the effect of the notice given by the appellant to Mr. Nelson has to be considered. It has been established by a long series of decision that notice to the person who owes the debt will

(1) 10 Exch., 545.]

(2) L.R., 2 Q.B., 474.

(3) L.R., 12 Eq., 354.

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take the case out of the section [See *Belcher v. Bellamy*(1); *Alletson v. Chichester*(2); *Ex parte Union Bank of Manchester*(3); *In re Seaman*(4); *Tailby v. Official Receiver*(5).] The notice of course must be an effective notice—that is to say, it must be such a notice as would prevent the party who owes the debt from paying any one but the party giving notice

In the present case it is in evidence that before the adjudication a notice was sent on behalf of the appellant to Mr. Nelson that the debt was claimed by the appellant. Assuming the appellant was the true owner of the debt and C Bhashyam Ayyangar the apparent owner, the legal effect of this letter was, in my view, to take the debt out of the order and disposition of the apparent owner before the insolvency.

But although I do not agree with the view taken by the learned Judge with reference to the question of reputed ownership, I think he was right in dismissing the application. By virtue of section 7 of the Act, upon the adjudication and the vesting order made thereunder, the right, title and interest of the insolvent in and to the debt due from Mr. Nelson to him became vested in the Official Assignee. Assuming that the effect of the instrument of March 13th, 1897, was merely to create a charge and that the instrument did not operate as an assignment, either legal or equitable (and this, I think, is the true view), the right which vested in the Official Assignee was a right to sue for the debt.

After Bhashyam Ayyangar's interest in the debt became vested in the Official Assignee, the appellant, by virtue of the decree in his mortgage suit, acquired the right to have the debt sold. Before the debt was sold, the Official Assignee's chose in action was reduced into possession by the fact of the payment to him by Mr Nelson. In this state of things it seems to me that the appellant's procedure by way of attachment was clearly misconceived and that the order for attachment of the debt in the hands of the Official Assignee was ineffective. The appellant has the rights of a secured creditor in the insolvency of C. Bhashyam

(1) 17 L.J., Ex., 219.

(3) L.R., 12 Eq., 351

(5) L.R., 13 App. Cas., 523,

(2) L.R., 10 C.P., 319.

(4) [1896] 1 Q.B., 412.

Ayyangar and he is entitled to enforce these rights if he adopts the proper procedure. I express no opinion as to whether he would have been entitled to enforce his rights by execution proceedings in the suit in which he obtained his mortgage decree if, after the adjudication, he had made the Official Assignee a party to the suit. During the pendency of the appellant's suit and before he obtained his decree, C. Bhashyam Ayyangar's interest in the debt due to him from Mr. Nelson, subject to the appellant's equitable rights therein, devolved by operation of law upon the Official Assignee. The appellant might have applied under sections 32 and 372 of the Code of Civil Procedure to have the Official Assignee added as a party. He did not do so. It seems to me that section 372 applies to the devolution of an interest by reason of an adjudication in insolvency and a vesting order thereunder, and if the case of *Miller v. Budh Singh Dudhuria*(1) is to be regarded as a decision the other way, I think that decision is wrong. In *Muller v. Lukhmani Debi*(2) the attachment was before the vesting order. In the present case the order for attachment was after the vesting order. It has been argued on behalf of the appellant that the Official Assignee is bound by the decree, though not a party to the suit, inasmuch as the devolution of interest took place *pendente lite*. This, in my opinion, is clearly not so. In the first place, the subject-matter of the suit was not real property. In the second place, the interest devolved by operation of law, and so far as the Official Assignee is concerned the devolution was *in invitum*. For the reasons I have stated I do not think the appellant is entitled to an order for the payment over of this money by virtue of his so-called "attachment," and if he is not entitled by virtue of his "attachment" there is, so far as I can see, no provision of law or principle of equity which entitles him to the order for which he asked on an application made in a suit to which the person who was called upon to pay over the money was not a party.

I think the application was rightly dismissed by the learned Judge and that this appeal ought to be dismissed with costs.

BHASHYAM AYYANGAR, J ---I am also of the same opinion.

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(1) I.L.R., 18 Cal., 43.

(2) I.L.R., 28 Cal., 419.

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Whether section 23 of the Insolvency Act applies to the case or not, depends upon two questions:—

(i) Who was the "true owner" of the chose in action—viz., the debt of Rs 4,000, due to the judgment-debtor, which debt among other things is comprised in exhibit A which purports to be a mortgage security executed by him to the plaintiff (appellant).

(ii) Whether in case the plaintiff was the "true owner," the said chose in action was with his consent and permission "in the possession, order or disposition" of the defendant (the judgment-debtor) at the time the petition of insolvency was filed by him.

In the decree which was passed in favour of the plaintiff the said mortgage security was treated as a regular mortgage-deed by providing for redemption by the defendant and re-conveyance to him by the plaintiff, if the amount decreed were paid on or before the day fixed in the decree, and ordering a sale of the goods and chattels comprised in the schedule. The chose in action now in question is assumed to be comprised in the said schedule though it is not specifically included in it.

If exhibit A can be construed as an assignment, or transfer by way of mortgage of the debt in question, along with other chattels to the plaintiff, as security for the mortgage debt, (section 134 of the Transfer of Property Act) or as an agreement to make such assignment, the plaintiff would undoubtedly be the "true owner," and the defendant, the "reputed owner" of the chattels therein comprised, within the meaning of section 23 of the Insolvency Act, and the solution of the second question also rendered easy by the fact that before the defendant was adjudicated an insolvent, notice of the plaintiff's claim appears to have been duly given by the plaintiff on the 2nd and 5th August 1899 to Mr. Nelson who owed to the defendant the debt in question. If exhibit A were construed as a mortgage the plaintiff would be the "legal" owner and if it could be construed as entitling him to obtain a mortgage, he would be the "equitable" owner. In regard, however, to the debt in question, which did not exist at the time when the security was given, but was a future debt which came into existence and became owing before the adjudication of insolvency, the plaintiff, under either construction of the instrument, can be regarded only as an "equitable mortgagee." The expression "true owner" has been definitively settled to apply as much

to an equitable owner as to a legal owner (*Ex parte Union Bank of Manchester*(1); *Bhavan Muli v. Kavasji Jehangir Jasawala*(2)).

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If the plaintiff be the true owner, there would be no difficulty in regarding the mortgagor in possession, *i.e.*, the defendant, as reputed owner.

Though exhibit A purports to give the plaintiff a mortgage of all the stock-in-trade, existing and future debts, &c., yet there are in it no words transferring to the plaintiff the ownership or any interest in the chattels. The ownership and the right to possession are fully reserved by the defendant, and the plaintiff is only given the right to inspect the defendant's books of account and other stock-in-trade and effects, during the time the security is in force. Even in default of payment the creditor is not given any right to take possession of the goods and chattels.

It seems to me that the instrument can be construed only as creating in favour of the plaintiff, a charge or hypothecation without passing to him "either an absolute or a special property in the subject of the security or any right of possession, but only a right of realisation by judicial process in case of non-payment of the debt" (Judgment of Lord Holt, in *Johnson v. Shuppen*(3); *Stainbank v. Fenning*(4); *Stainbank v. Shepard*(5)).

In *Burlinson v. Hall*(6), Day, J., in distinguishing, for the purposes of section 25, sub-section 6 of the Judicature Act (1873), an absolute "assignment" by way of mortgage of a debt, from a transaction "purporting to be by way of charge only" on the debt, defined a mere "charge" as follows (at page 350):—

"It is said that the assignment 'purports to be by way of charge only.' It is said that it is a mere 'charge.' I do not agree. A 'charge' differs altogether from a 'mortgage.' By a charge, the title is not transferred, but the person creating the charge merely says that out of a particular fund he will discharge a particular debt. But a charge differs from an 'assignment.' A charge on a debt confers rights on the person to whom the charge is given, to have it enforced by assignment—not by action against the debtor, but by proceeding against the person who created the

(1) L R, 12 Eq, 351

(2) I L R, 2 Bom, 542 at p 546.

(3) 2 Ld Raym, 982

(4) 11 C B, 51, 15 Jur, 1082.

(5) 17 Jur, 1032.

(6) L R., 12 Q B D., 347 at p. 350.

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charge, to assign the debt." This was fully concurred in by A.L. Smith, J. (*per* Lord Hatherly, L.C., in *Tennant v. Trenchard*(1).

It will be seen that even a mere charge or hypothecation is treated as an "equitable assignment" under the English Law (Fisher on 'Mortgages,' 5th edition, paragraph 225). It may be that under the Indian procedure the proceedings against the person who created the charge should be not to enforce assignment of the debt, but for sale of the debt as a chattel. But that really comes to an involuntary assignment by the person who created the charge. In a case arising under the Indian Insolvency Act (11 & 12 Vict., cap. 21) I prefer to be guided by English cases rather than by deductions to be drawn from the Indian Code of Civil Procedure.

During the argument of this appeal, I was under the impression that in the case of a mere charge, the charge-holder is not the true owner, but that the person who created the charge continues to be the true owner, that he cannot therefore be regarded as the reputed owner and that the section therefore would be inapplicable. But on further reflection I have come to the conclusion that in section 23 the expression "true owner" standing in antithesis to "reputed owner" in the same section, is not used in any technical sense, but in its true and popular sense as indicating the person who for all practical purposes is the real and substantial owner of the goods and chattels, *i.e.*, the person having the real and substantial interest in them, whether in the eye of law or of equity, the person creating the charge who technically continues to be full owner or the mortgagor, as the case may be, being entitled merely to the difference if any between the full price of the goods and chattels, and the amount charged thereon in favour of the creditor. A charge-holder is as much the substantial owner of and has as substantial an interest in the goods and chattels as the mortgagee thereof and if either of them allows the mortgagor or the person creating the charge to remain in possession of the goods and chattels, under circumstances which will lead to his being "reputed" as owner and to his being enabled to command credit thereby, he will be estopped from asserting his substantial interest or ownership in the property as against the Official Assignee.

This being the principle underlying section 23 of the Insolvency Act it can make no difference whether the person allowing the

(1) L.R., 4 Ch. App., 537 at pp. 543 and 544.

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goods and chattels to remain in the "possession, order or disposition" of the person adjudged an insolvent, is a mere charge-holder, or a mortgagee or absolute and full owner. In *Ex parte Union Bank of Manchester*(1) already referred to, Sir James Bacon, C.J., explains the policy of the "order and disposition" clause in the Insolvency law as follows:—(page 357) "The 'order and disposition' clause has been frequently objected to and reprobated, yet from the commencement of Bankruptcy law it has been maintained as a principle that property suffered to remain in the visible possession of a bankrupt is divisible among his creditors, and so the law is now. I had at first doubts whether the equitable mortgagee in this case was the true owner; but my doubts have been removed by the series of decisions quoted by Mr. De Gex in which the mortgagee has been held to be the true owner." Kennedy, J., as Commissioner in Insolvency in *In re Murray*(2) dealing with the order and disposition clause in connection with goods pledged by the insolvent and re-delivered to him on commission sale, made the following significant observation as to the principle of that clause, (at page 63) "I believe it to be impossible and against the spirit of the Act, by any conveyancing device to give a lien for money advanced upon goods previously the property of the bankrupt and returned to or permitted to remain with him. The power of so borrowing money would be much more dangerous than that of raising money by sales at an undervalue equivalent to the amount which would be advanced on pledge."

"Where a mortgagor, is by the mortgage-deed entitled to remain in possession till demand, it has been held he is in possession with the consent of the true owner—the mortgagee (*Freshney v. Carrick*(3)). It was formerly held in some cases that when the mortgagee has covenanted to allow the mortgagor to remain in possession, the 'order and disposition' clause did not apply; but these cases cannot now be relied on (*Ashton v. Blackshaw*(4); *Ex parte Homan*(5); *Ex parte Harding*(6)). Where there is a mortgage of chattels with a proviso for quiet enjoyment by the mortgagor till default, or where the mortgagor takes under

(1) L.R., 12 Eq., 354.

(3) 1 H. & N., 653.

(5) L.R., 12 Eq., 598.

(2) I.L.R., 3 Calo., 58 at p. 63.

(4) L.R., 9 Eq., 510.

(6) L.R., 15 Eq., 223.

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the mortgage-deed an interest in the chattel determinable upon his default in payment, and on notice from the mortgagee, the mortgagor, no doubt, is in a sense the true owner, as the mortgagee cannot until the term of interest of the mortgagor is determined, bring trover (*Fenn v. Battleston*(1)), and if the mortgagee seizes the chattels without due notice of payment, the mortgagor can bring trespass against him (*Brienly v. Kendall*(2)). But within the 'reputed ownership' clause in the Bankruptcy law, it has been held that in these cases the mortgagor is not the true owner, 'on the ground that such interest of the bankrupt was really illusory, and substantially, if not technically, permissive, that the law will not allow a mortgagor of chattels to stay in possession and so evade the rule and that where the mortgagee can enter into possession by giving a short notice or (as it was put by Mr Justice Willes) where the mortgagee consents to put himself in a position in which he has no immediate right to the possession of the goods, they are in reality in the possession of the mortgagor with the consent of the true owner (*Spachman v. Miller*(3)). So far as the general creditors are concerned, the mortgagor in such a case, has the reputation of absolute ownership, though as between himself and the mortgagee, he has a real though limited interest." Robbins on 'Mortgages'—page 185.

I have not been able to find any English case in which the question of "reputed ownership" presented itself for consideration, in connection with a mere charge or hypothecation of a chose in action or other chattels, as distinguished from an assignment thereof by way of mortgage. But having regard to the authorities above quoted and the policy of the "order and disposition" clause, it seems to me that no distinction can be made between the two classes of cases. A mere charge or hypothecation being regarded under the English equity jurisprudence as an "equitable assignment," it must be held that the decision of Sir James Bacon, C.J., in *Ex parte Union Bank of Manchester*(4) above quoted, is applicable as much to a mere charge or hypothecation of a chose in action, as to an equitable mortgage by a deposit, with a banker, of a certificate of shares in a joint stock gas company.

(1) 7 Lxch, 152.

(3) 12 C B N S, 659

(2) 17 Q B, 937

(4) L R, 12 Eq, 354

In *In the Matter of Ambrose Summers*(1), Mr Justice Sale, as Commissioner in Insolvency, gave effect, as against the Official Assignee, to a letter of lien over stock-in-trade, &c, given by an insolvent to his creditor by way of collateral security for a promissory-note and for future advances. The insolvent also undertook by his letter to execute, whenever called upon by his creditor to do so, an assignment of all his business with such conditions as the creditor might require. The letter was written on the 31st December 1889, and in July 1895 the creditor called upon the insolvent to execute an assignment by way of mortgage of the whole of his business, stock-in-trade, &c. But the insolvent, though he approved of the draft mortgage-deed, subsequently refused to execute it. On 21st August 1895, the attorneys of the creditor served a notice on the insolvent, demanding possession on behalf of the creditor, which was refused. They then attempted to take physical possession, but failed, and on the next day, 22nd August 1895, the insolvent filed his petition and the Official Assignee took possession of the sale-proceeds of the insolvent's stock-in-trade, &c. Upon these facts, Justice Sale held that the letter "must be regarded in the first place as a letter of hypothecation, whereby the insolvent pledged to the bank the then existing assets of his business as collateral security for the debt then due to the bank and for any future advances the bank might make to the insolvent. Accordingly on the authority of *Ex parte North Western Bank*(2) the letter created an equitable charge on such assets in favour of the bank." He therefore held that the bank was entitled to preferential payment of "so much of the funds in the hands of the Official Assignee as can be shown to represent assets of the insolvent's business, which were in existence at the date of the letter of hypothecation." The ground of decision, which is not expressly stated, does not seem to be that the case so far as it related to the charge on the assets which were in existence at the date of the hypothecation, was outside the "reputed ownership" clause. I gather from the observation (at page 600) as to the attempts made by the bank to take possession, that the ground of decision was that the bank "did enough to show that the business or stock-in-trade of the insolvent was not in the order or disposition of the

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(1) I.L.R., 23 Calc., 592.

(2) L.R., 15 Eq., 69.

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insolvent at the date of his insolvency, with the permission and consent of the bank." As regards the agreement contained in the letter, to execute an assignment of future business, Justice Sale held that it was invalid, as against the Official Assignee, as an act of bankruptcy within the meaning of section 9 of the Insolvency Act.

In my opinion, therefore, the plaintiff was the true owner of the debt due to the defendant from Mr. Nelson. The point now to be considered is whether, before the defendant was adjudged an insolvent, it was taken out of his order and disposition by the plaintiff, the true owner. This question is concluded in favour of the plaintiff by the decision of the House of Lords in *Tailby v. Official Receiver* (1). In that case, by a mortgage dated 13th May 1879, Izor assigned for valuable consideration, to the predecessors in title of the appellant, his stock-in-trade and all the book debts owing or which might, during the continuance of the security, become due or owing to the said mortgagor. In the months of October and November 1884, Izor supplied a firm of Wilson Brothers & Co., upon credit, with goods to the value of £10-7-11. The appellant gave notice of the assignment to that firm and received payment of the amount to himself. Sometime after the date of the notice, Izor was adjudged bankrupt and the respondent who was trustee of the estate, sued the appellant for repayment of the amount received by him from Wilson Brothers & Co. The amount due by them to the insolvent, being a chose in action, did not come within the scope of the Bills of Sale Act and though it was not in existence at the date of the assignment, was capable of being the subject of present assignment in equity. Lord Watson (at page 534) held that "in the case of book debts as in the cases of choses in action generally, intimation of the assignee's right must be made to the debtor, or obligee in order to make it complete. That is the only possession which he can attain so long as the debt is unpaid and is sufficient to take it out of the order and disposition of the assignor. In this case the appellant's right if otherwise valid, was, in any question with the respondent duly perfected by the notice to Wilson Brothers & Co. before Izor became a bankrupt."

Such notice, appearing to have been given in this case to Mr. Nelson, before the defendant was adjudged an insolvent, the debt

(1) L R, 13 App Cas, 523.

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was not in the possession, order or dispossession of the insolvent at the time of the vesting order.

Even in the view that there was a mere charge upon the debt as distinguished from an assignment of the same by way of mortgage, it is taken out of his order and disposition, if not by the alleged notice to Mr. Nelson, at any rate by the suit which was brought against the defendant to enforce the charge prior to his being adjudicated an insolvent (*per* Day, J, in *Burlinson v. Hall*(1) already referred to).

If the plaintiff otherwise had a valid charge on the debt in question, it is not extinguished by section 23 of the Act and under section 7 it would have vested in the Official Assignee, subject to the plaintiff's charge.

The question which has now to be considered is whether the decree which the plaintiff obtained against the defendant, subsequent to his adjudication as an insolvent, enforcing the charge by directing a sale, is binding upon the Official Assignee and if so, whether he can be ordered in proceedings in execution of that decree to pay to the plaintiff the amount of Rs. 4,000, which was paid by Mr. Nelson into the hands of the Official Assignee, notwithstanding the notice which, it is alleged, was given to him by the plaintiff, prior to the adjudication of the defendant as an insolvent.

The decree, in so far as it is a mere money decree, is perfectly valid against the insolvent and I agree with the decision of the Calcutta High Court (in *Miller v. Budh Singh Dudhuria*(2) followed in *Chandmull v. Ranee Soondery Dossee*(3)) that in an action purely '*in personam*' against the insolvent, whether he was adjudged an insolvent prior to the institution or during the pendency of the suit, the Official Assignee need not be made a defendant either in addition to or in lieu of the insolvent, that in fact it is wrong to do so and that section 372 of the Civil Procedure Code is applicable only to the case of an assignment of an interest in the subject-matter of the suit during the pendency of the suit. If the attachment which was made of the debt due from Mr Nelson is to be regarded, as an attachment made in execution of the first part of the decree as a mere money decree, it has necessarily to be

(1) L R., 12 Q B.D., 347

(2) I.L.R., 18 Calc., 43.

(3) I.L.R., 22 Calc., 259.

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released from attachment (under section 280 of Civil Procedure Code) by reason that the vesting order was prior to such attachment. Further, if, as the plaintiff says, he has a charge upon the debt, section 99 of the Transfer of Property Act, or at any rate the principle therein involved, is a bar to his bringing the debt to sale in execution of his decree as a mere money decree and he can bring it to sale only in enforcement of his charge thereon.

The decree, as a mortgage decree directing the sale of the chattels, including the debt in question, is void and inoperative as against the Official Assignee, inasmuch as the whole right, title and interest of the defendant therein devolved by operation of law upon the Official Assignee during the pendency of the suit and before the decree was passed. Unless therefore the doctrine of '*lis pendens*' is applicable when chattels personal form the subject-matter of the suit and to cases of assignment by operation of law, the decree against the insolvent enforcing the mortgage or charge by an order for sale, can be no more binding upon the Official Assignee or be capable of being executed against him, than it would have been if the defendant had been adjudged an insolvent prior to the suit and the suit had been brought against him and him alone subsequent thereto and the decree obtained. If the doctrine of *lis pendens* be applicable to the case, the decree can of course be executed against the Official Assignee in the same manner as against the judgment-debtor himself (section 333 of the Civil Procedure Code); and the fact that the Official Assignee received payment of the debt from Mr. Nelson, will make no difference and he can be directed in execution of the mortgage-portion of the decree to pay over the amount to the decree-holder (section 277, Civil Procedure Code) just as the judgment-debtor himself can be so ordered, if he had received such payment from Mr. Nelson.

The decision of the Court of Appeal in *Wigram v. Buckley*(1) is a direct authority that the doctrine of *lis pendens* does not apply to personal property 'other than chattel interests in land.' The decision of the Master of Rolls in *Wood v. Surr*(2) is an equally direct authority on the other question that where a mortgagor becomes bankrupt pending the suit, the trustee in bankruptcy is not bound by a decree for foreclosure, in his absence. (Robbins—

(1) [1894] 3 Ch., 483.

(2) 19 Beav., 551.

'Mortgages,' page 1012; Fisher—'Mortgages,' 5th edition, concluding portion of paragraph 1651)

The principle of the decision in *Wood v. Suri* (1) is that the Official Assignee being one appointed '*in invitum*' and not a 'voluntary purchaser' as in the case of a transfer by act of parties or by an 'involuntary sale' in execution of a decree, the doctrine of *lis pendens* cannot affect him and the party seeking to bind him (the Official Assignee) by the result of the suit, pending which the interest of its subject-matter has devolved on him by operation of law, ought to take proceedings to join him as a party to the suit (under section 372 of the Civil Procedure Code) and obtain the decree against him.

A charge or mortgage created by the insolvent, prior to his adjudication as an insolvent, may, under the bankruptcy law, be void against the Official Assignee though, under the general law, it may be binding on the insolvent himself. A decree, therefore, purporting to enforce such charge or mortgage will bind the Official Assignee only if it was passed in a proceeding between the secured creditor and the Official Assignee, in which the validity of that charge or mortgage, as against the Official Assignee, was adjudged.

The learned Judge was therefore right in dismissing the plaintiff's application and I agree that this appeal should be dismissed with costs.

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(1) 19 Beav, 551

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

1901.
October 10.

SUBBA NAIDU (PLAINTIFF), APPELLANT,

v.

NAGAYYA AND OTHERS (DEFENDANTS NOS 5 TO 7 AND 24),
RESPONDENTS *

*Hindu Law—Enfranchisement of land in favour of widow as personal inam land—
Lease by widow—Sale of the land by her reversioners—Validity of lease—Title
of purchaser.*

Certain land had been enfranchised in favour of a Hindu widow as personal inam land. The widow executed a lease in respect of it in favour of the defendants. The reversioners of the widow sold the land to plaintiff, who, after the widow's death, sued to recover possession of it from the lessees, on the ground that their lease was not valid as against the reversioners nor as against plaintiff as then vendee.

Held, that the plaintiff had shown no title.

SUIT to recover land. Sinamma, a Hindu widow, had leased the land in question in the appeal to defendants Nos 5, 6, 7 and 24. Defendants Nos. 1 and 2 were the reversioners of Sinamma and plaintiff had purchased the land from them. Neither these nor defendants Nos. 3 and 4 defended the suit. Sinamma died, whereupon plaintiff, as vendee of the reversioners, brought this suit, contending that the lease by Sinamma was not binding on the reversioners, nor, consequently, on him. Defendants Nos. 8 to 23, who occupied a portion of the land, entered into a compromise with plaintiff, and a decree was passed as against them in terms of it. The Munsif also decreed against defendants Nos 1 to 4. As against defendants Nos 5, 6, 7 and 24, however, he dismissed the suit. The land occupied by these defendants had originally been personal inam land, and had been enfranchised in the name of Sinamma, after the death of her husband. Their defence was that by the enfranchisement of the property in her name, Sinamma became the absolute owner of it and could alienate it as

* Second Appeal No 604 of 1900 against the decree of G. W. Elphinstone, Acting District Judge of Cuddapah, in Appeal Suit No 7 of 1899, affirming the decree of T. A. Narasimhachari, District Munsif of Nandalu, in Original Suit No. 442 of 1897.

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she pleased; and that therefore the lease made by her to these defendants was valid. The Munsif adopted this view, and held that Sinamma was competent to make the lease and that plaintiff was not entitled to claim possession during its continuance. As against these defendants therefore he dismissed the suit. Plaintiff appealed, and (after further findings had been returned by the Munsif), the District Judge dismissed the appeal. He said:—
“The lands were originally personal inam and were enfranchised in the name of Sinamma after her husband’s death. The appellant’s vakil admits that the decision in *Dharanipragada Durgamma v. Kadambari Virrazu*(1) gives a widow absolute property under the grant from Government, but contends that the decision only applies to enfranchised service inams, and not to personal inams; and that the decision in *Narayana v. Chengalamma*(2) should be followed. That decision however also applied to a service inam, and has been overruled by the later case. I am however of opinion that the ruling in this latter case applies equally to personal inams, and that the enfranchisement in the name of the widow conferred an absolute title on her. The appeal is accordingly dismissed with costs.”

Plaintiff preferred this second appeal.

Ramachandra Rao Saheb for appellant.

Seshagiri Ayyur for respondents Nos. 3 and 4.

JUDGMENT.—The plaintiff sues to recover land in the possession of the defendants on the strength of his purchase from the reversioners of a Hindu widow in whose favour the land was enfranchised as a personal inam. The District Judge dismissed the suit on the authority of *Dharanipragada Durgamma v. Kadambari Virrazu*(1) considering that the same principle would apply to a personal inam as to a service inam. We do not think, however, that the cases are parallel. When a service inam is enfranchised the reversionary interest of Government is given up, but when a personal inam is enfranchised the reversionary right of Government is expressly reserved under the rules of the Inam Settlement. The plaintiff does not produce the inam title-deed or show that the grant in this case was made on terms other than those sanctioned by the general rules,

(1) I L R 21 Mad, 47.

(2) I L R., 10 Mad, 1

SUBBA NAIDU v. NAGAYYA. the reason no doubt being that there is no variation. The plaintiff in fact comes into Court without any title, his vendor the reversioner, having none.

The second appeal therefore fails and it is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Bhashyam Ayyangar.

In Appeal against Order No. 44 of 1901 :—

1901.
October 15.

NATESA AYYAR (PETITIONER—FIRST APPELLANT'S REPRESENTATIVE
IN APPEAL No. 135 of 1896 AND SUPPLEMENTAL FOURTH DEFENDANT
IN ORIGINAL SUIT No. 15 of 1895), APPELLANT.

v.

ANNASAMI AYYAR AND OTHERS (COUNTER-PETITIONERS AND
PLAINTIFFS), RESPONDENTS.*

In Appeal against Order No. 63 of 1901 :—

NATESA AYYAR (PETITIONER—DEFENDANT'S REPRESENTATIVE),
APPELLANT,

v.

ANNASAMI AYYAR (COUNTER-PETITIONER), RESPONDENT.†

Practice—Decree awarding costs as against two defendants—Payment by one defendant—Appeal by both defendants jointly to High Court against decree—Death of defendant who paid during pendency of appeal—Prosecution of appeal on behalf of survivor alone—Reversal of decree by High Court—Claim by legal representative of deceased defendant for restitution of amount paid as costs.

A decree was obtained in a District Court against two defendants, by which they were ordered to deliver up certain property and to pay the costs of the suit. These costs were in fact paid by the first defendant. An appeal was preferred by both defendants jointly to the High Court, but the first defendant died while it was pending. The legal representative of the deceased defendant was not brought on the record, and when the appeal came on for hearing it was proceeded with by the second defendant on his own behalf. The result was that the High Court reversed the decree of the District Court, but the High Court decree recited that the appeal had been prosecuted on behalf of the surviving defendant alone.

* Civil Miscellaneous Appeals Nos. 44 and † 63 of 1901 against the orders of H. G. Joseph, District Judge of Trichinopoly, in Execution Petitions No. 536 of 1900 and No. 58 of 1901, respectively, in the matter of Original Suit No. 15 of 1895.

The son and legal representative of the first defendant now presented a petition in execution and claimed that the whole decree of the District Court had been reversed and that in consequence he was entitled to restitution of the costs which had been realised by the plaintiffs (counter-petitioners), from the deceased first defendant :

Held, that as it was expressly recited in the High Court decree that the appeal had been prosecuted on behalf of the surviving defendant alone, the decree must be construed as limited to his interests. And that the decree of the Original Court must be regarded as still in force against the first defendant ; and his heir, the petitioner, was, therefore, not entitled to restitution of the costs levied from his father under that decree until he had successfully prosecuted the appeal of his father which was still pending.

APPLICATION for execution. Petitioner was the son and legal representative of one Ramasami Ayyar, deceased, who had been first defendant in a suit in the District Court of Trichinopoly (Original Suit No. 15 of 1895) in which there was one other defendant. The plaintiffs in that suit obtained a decree, under which both defendants were directed to deliver up possession of the property of a temple, and to pay Rs. 332-5-0 as costs. These costs were paid by first defendant alone. The defendants appealed jointly to the High Court (in Appeal No. 135 of 1896) but whilst the appeal was pending, first defendant died. The appeal was prosecuted by the second defendant alone, the legal representative of the first defendant not being brought on the record. In the result, the High Court reversed the decree of the District Court and dismissed the suit, the appellate decree reciting that the appeal had been prosecuted on behalf of the second defendant (the survivor) alone. Petitioner now claimed that the plaintiffs in the suit were liable to refund to him, as the representative of the deceased first defendant, the amount levied by them from the first defendant as costs. The District Judge passed an order to the effect that the application should be made to the High Court.

Against that order the petitioner preferred this appeal.

V. Krishnasami Ayyar for appellant.

Sundara Ayyar and *T. S. Natesa Sastri* for respondents.

JUDGMENT.—The Appeal No. 135 of 1896 on this Court's file was preferred jointly by the first and second defendants, against both of whom the decree appealed against was passed. During the pendency of the appeal one of the appellants, namely, the first defendant died, and without his legal representative being brought on the record the appeal came on for hearing. Mr. Sankara Nayar, as the surviving appellant's vakil, then represented

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to the Court that he was prepared to go on with the appeal on behalf of the survivor; and the appeal was accordingly heard, with the result that the decree appealed against was reversed and the suit dismissed with costs throughout.

It is contended by the petitioner, the appellant before us, who is the son and legal representative of the deceased first defendant, that in the appeal prosecuted by the second defendant alone, the whole decree was reversed and the suit as against both the defendants was dismissed and that consequently the petitioner, as the legal representative of the first defendant, is entitled to restitution of the amount of costs realized by the plaintiffs against the first defendant only in execution of the original decree that was reversed in appeal. We are unable to accept the construction placed by the petitioner's vakil on the decree of this Court. It is expressly recited in that decree that the appeal was prosecuted only on behalf of the surviving defendant and we must therefore construe the decree as limited to his interests only. It would be unreasonable to construe the decree as being intended to enure for the benefit of the first defendant also, and to consider that the decree appealed against was reversed in favour of his representative. According to our construction of the appellate decree the decree of the Original Court must be regarded as still in force as against the first defendant and his heir, the petitioner, is therefore not entitled to restitution of the costs levied from his father under that decree until he successfully prosecutes the still pending appeal of his father. The petitioner being a minor, the law of limitation will be no bar to his taking the necessary steps towards that end. These appeals are therefore dismissed, but in the circumstances of the case we make no order as to the costs of the appeals.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Moore

KARUPPA GOUNDAN (PLAINTIFF), APPELLANT,

v

1901
October 18.KUMARASAMI GOUNDAN AND OTHERS (DEFENDANTS NOS 1 TO 5),
RESPONDENTS.**Hindu Law—Sudras—Illegitimate son—Claim to partition of property of father's brother's sons—Maintainability*

An illegitimate son claimed to be entitled to a share in the property of his father's brother's sons

Held, that he was not so entitled, and that the principle laid down in *Raja Jogenra Bhupati Hurri Chundun Mahapatra v Nityanund Mansingh*, (L R, 17 I A, 128, I L R, 18 Calc., 151)—where it was held that an illegitimate son is a co-parcener of his father's legitimate son—should not be extended to the case of other collateral heirs, having regard to the rulings in *Krishnayyan v Muttusami*, (I L R, 7 Mad, 407), *Ranoji v Kandaji*, (I L R, 5 Mad, 557), and *Parvathi v Thurumalai*, (I L R, 10 Mad., 334)

Shome Shankar Rajendra Varer v Rajesai Swami Jangam, (I L R, 21 All, 99) approved

SUIT for partition. Plaintiff alleged that his father and the father of defendants Nos. 1 to 4 were brothers, and claimed partition of the family property. Defendant No. 5 was the son of defendant No 2 and had been formally added. The defence was that plaintiff was not the legitimate son and legal heir of his father, but was an illegitimate son by a woman who had been previously married and had been kept by plaintiff's father as a concubine; and that plaintiff was not entitled to a share of the family property under the Hindu Law. The Munsif dismissed the suit on the ground that all the co-parceners had not been made parties to it; and both the Munsif and the Subordinate Judge found that plaintiff was the illegitimate son of his father, his mother being a concubine who had been continuously kept by his father, and was unmarried. On the question of the rights of an illegitimate son to the property under the Hindu Law the Subordinate Judge said:—"Assuming for sake of argument that plaintiff's father and first defendant's father were undivided, plaintiff cannot still succeed in this suit. It has been held by their Lordships of the Madras

* Second Appeal No. 612 of 1903 against the decree of W. Gopalachariar, Subordinate Judge of Bellary and Salem, in Appeal Suit No. 202 of 1896, affirming the decree of V. K. Desikachariar, District Munsif of Namakkal, in Original Suit No. 518 of 1895.

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High Court that the illegitimate son of a Sudra is not entitled to take the undivided interest of his father, and that he cannot claim partition as against the undivided brother of such father or the sons of such brother, *Krishnayyan v. Muttusami*(1). In *Ranoji v. Kandoji*(2), it was again held that such an illegitimate son is entitled only to maintenance and not a share. This decision was followed in *Parvathi v. Thirumalai*(3). It was observed that the illegitimate son is not a co-parcener with his father's undivided brother or with the sons of his such brother, (that is the present case) and that he cannot demand a partition of ancestral property : and the aforesaid decisions were also approved in *Thangam Pillai v. Suppa Pillai*(4). Plaintiff is not entitled to claim any share." He confirmed the decree of the lower Court dismissing the suit.

Plaintiff preferred this second appeal.

V. Krishnasami Ayyar for appellant.

Kasturiranga Ayyangar and *Raghava Ayyangar* for respondents.

JUDGMENT.—It has been decided by both Courts that the plaintiff was the illegitimate son of his father and we are bound by that decision unless the matter was *res judicata*. We find nothing in the judgment of this Court to which we have been referred deciding that the plaintiff was a legitimate son.

It is then urged for the plaintiff that as an illegitimate son he is still entitled to a share in the property of the defendants, his father's brother's sons, on the ground that he is a co-parcener of theirs. The authority quoted in support of this contention is *Raja Jogendra Bhupati Hurri Chundun Mahapatra v. Nityanund Mansingh*(5) where it was held that an illegitimate son was a co-parcener of his father's legitimate son. The decision stops there, and we are not prepared to extend its principle to the case of other collateral heirs in the face of the rulings of this Court, in *Krishnayyan v. Muttusami*(1), *Ranoji v. Kandoji*(2), and *Parvathi v. Thirumalai*(3)—the two former of which were cited at the hearing of the Indian appeal above noted and which were not commented on or disapproved.

We agree with the learned Judges of the Allahabad High Court who decided the case of *Shome Shankar Rajendra Varere v. Rajesar Swami Jangam*(6), as to the effect of the decision of the Privy Council in the case relied on by the appellant's vakil.

The second appeal therefore fails and is dismissed with costs.

(1) I.L.R., 7 Mad., 407.

(2) I.L.R., 8 Mad., 557.

(3) I.L.R., 10 Mad., 334.

(4) I.L.R., 12 Mad., 401.

(5) L.R., 17 I.A., 128; I.L.R., 18 Calc., 151.

(6) I.L.R., 21 All., 99.

APPELLATE CIVIL—FULL BENCH.

*Before Sir Arnold White, Chief Justice, Mr. Justice Davies,
Mr. Justice Benson, Mr. Justice Bhashyam Ayyangar
and Mr. Justice Moore.*

PERIASAMI AND OTHERS (PETITIONERS), APPELLANTS,

v.

KRISHNA AYYAN AND OTHERS (COUNTER-PETITIONERS),
RESPONDENTS.*

1901.
July 31.
November
21.
1902.
January
15, 16.
March 26.

Limitation Act—Act XV of 1877, ss. 7, 8, sched. II, art. 179—Application for execution of decree—Joint decree in favour of three persons—Previous application more than three years before while one decree-holder was a minor—Attainment of majority by that decree-holder within three years of present application—Limitation—"Joint execution-creditors"—"Joint creditors"—"Person entitled"—Civil Procedure Code—Act XIV of 1882, s. 231.

On 30th June 1892, a joint decree was passed in favour of three brothers, who, at the date of the decree, were all minors. On 8th January 1896, the last application for execution, previous to the present one, was made. At this date two of the brothers had attained majority and one was a minor. On 25th February 1899, the present application for execution was presented, the youngest brother having attained majority less than three years before the application. The application of 8th January 1896 was decided or assumed to have been made in accordance with law:

Held, that the decree was not capable of execution, either as a joint decree, or to the extent of the interest of the youngest decree-holder.

Section 7 of the Limitation Act, 1877, only applies where all the joint execution-creditors were under disability at the time when the period of limitation began to run.

Joint execution-creditors are not "joint creditors," within the meaning of section 8 of the Limitation Act, 1877.

The words "a person entitled to institute a suit or make an application" in section 7 of the Limitation Act refer to one who, in his own right, is so entitled, and not to a person who, by a rule of procedure, such as that contained in section 231 of the Code of Civil Procedure, is authorised, with the permission of the Court, to make an application for execution for the benefit of himself and others interested jointly with him in the decree to be executed.

Surja Kumar Dutt v. Arun Chunder Roy, (I.L.R., 28 Cal., 465), dissented from; *Seshan v. Rajagopala*, (I.L.R., 13 Mad., 236), and *Vigneswara v. Bapayya*, (I.L.R., 16 Mad., 436), approved.

* Civil Miscellaneous Second Appeal No. 9 of 1901 against the decree of L. C. Miller, District Judge of Salem, in Appeal Suit No. 263 of 1899, affirming the decree of T. B. Vasudeva Sastri, District Munsif of Tirupattur, in Execution Petition No. 278 of 1899, in Original Suit No. 871 of 1891.

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APPLICATION for execution. The decree, which bore date 30th June 1892, was a joint one in favour of three brothers—members of an undivided Hindu family—for money and in default of payment for the sale of mortgaged property. At the date of the decree all the brothers were minors. According to the execution petition now filed, a sale proclamation had been issued in 1893, the mortgaged property being sold later in that year, and notice had been issued in 1894, and also in 1895, without further proceedings being taken. On 8th January 1896, a further application for execution was made, a warrant was issued against first defendant and he was arrested. At that date, two of the plaintiffs had attained majority and one was still a minor. The present application for execution was made on 25th February 1899. The youngest plaintiff had attained majority less than three years before this application. The District Munsif considered that first and second plaintiffs were competent to give a valid discharge on behalf of the third plaintiff, and that time had begun to run as against all the plaintiffs as from 22nd January 1896,—the date upon which payment had been made of subsistence batta for the arrest of first defendant. He cited *Seshan v. Rajagopala*(1), and *Vigneswara v. Bapayya*(2), and held that the application was barred by limitation and dismissed it. The District Judge, on appeal, also considered *Seshan v. Rajagopala*(1) as binding on him and dismissed the appeal.

The petitioners preferred this appeal.

The case first came on for hearing before DAVIES and MOORI, JJ, who made the following

ORDER OF REFERENCE TO THE FULL BENCH —“We must refer the following question to a Full Bench —When there are two or more joint decree-holders, and the execution of the decree is barred by limitation as against one or more of them, whether one who is not so barred owing to minority can execute the decree for the benefit of all or, if not, for his own benefit alone? There is a conflict of opinion on the question between this Court (*Seshan v. Rajagopala*(1) and *Vigneswara v. Bapayya*(2)) and the Courts of Calcutta (*Anando Kishore Dass Bakshi v. Anando Kishore Bose*(3)), Bombay (*Govindram v. Tata*(4)) and Allahabad (*Zamir Hasan v.*

(1) I L R, 13 Mad, 236

(3) I L R, 14 Calc., 50

(2) I L R, 16 Mad, 436

(4) I L R, 20 Bom, 383.

Sundar(1)) and we are inclined to think that the view taken by the other Courts is correct."

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The case then came on for hearing before the Full Bench constituted as above

Bhashyam Ayyangar, for appellants, contended that though the present application had been presented more than three years after the previous one, the bar of limitation was saved by the minority of the youngest plaintiff,—at any rate so far as his own share was concerned. He referred to article 179 and section 7 of the Limitation Act, and contended that plaintiffs were persons "entitled" to make the application within the meaning of section 7 of the Limitation Act and section 231 of the Code of Civil Procedure. He distinguished *Seshan v. Rajagopala*(2), as being a suit for partition in which the plaintiffs did not obtain a decree for partition *inter se*. He referred to sections 462 and 258 of the Code; and also to *Gowndram v. Tutia*(3); *Zamir Hasan v. Sundar*(1); and *Surja Kumar Dutt v. Arun Chunder Roy*(4), as showing that one of several joint decree-holders cannot give a valid discharge. As there was a decree in favour of the three brothers jointly a discharge could not be given by any one of them. He also referred to *Ahinsa Bibi v. Abdul Kader Saheb*(5).

Seshayya Ayyar for respondents —The rights of all the decree-holders are barred, and at any rate the decree is barred as regards the shares of the two major applicants. Neither section 7 nor section 8 of the Limitation Act applies to the case, which is governed by the ordinary provision of limitation under section 4. In section 7, the word "person" means "persons," (see General Clauses Act): and the principle of *Perry v. Jackson*(6) clearly applies. In section 8, the term "creditor" does not include a decree-holder or an execution-creditor. This contention is made conclusively clear from the fact that when they introduced, in section 7, the word "application" by the Act of 1877, they made no similar change in section 8. Section 7 and the added explanations to article 179 are intended to be complete and the principle of section 8 has no bearing upon execution applications. On the true construction of section 7, *Seshan v. Rajagopala*(2) is well

(1) I L R., 22 All., 199

(3) I L R., 20 Bom., 383

(5) I L R., 25 Mad., 26

(2) I L R., 13 Mad., 236.

(4) I L R., 28 Cal., 465

(6) 4 T.R., 519.

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decided and should be followed. By the wording of section 7, which is clear, all the persons *entitled* to make the application must have been minors. Section 231 of the Code of Civil Procedure is permissive and the word "entitled" in section 7 cannot apply to section 231. The several clauses in article 179 should be applied in the order in which they stand; it is not open to a decree-holder to select a starting point from which limitation may run. *Lolit Mohun Misser v. Janohy Nath Roy*(1) was not intended to decide otherwise. An application by one of several joint decree-holders to execute a joint decree, takes effect on behalf of all, under explanation I to article 179. I contend that in no circumstances are the major decree-holders entitled to execute. [He referred to *Hurish Chunder Chowdhry v. Kali Sundari Debia*(2); *Sultan Moudeen v. Savaiyammal*(3); *Kudhar v. Sheo Dayal*(4); *In the matter of the Petition of Kally Soondery Dabia*(5); *Muthusami Ayyar v. Natesa Ayyar*(6); and *Brojeswari Chowdhranee v. Tripoona Soonderee Debi*(7)]

Bhashyam Ayyangar, in reply, cited *Banarsi Das v. Maharani Kuar*(8) and *Kuthath Haji v. Bavotti Haji*(9).

The Court expressed the following opinions:—

Sir ARNOLD WHITE, C.J.—The question which has been referred to a Full Bench is as follows:—"When there are two or more joint decree-holders, and the execution of the decree is barred by limitation as against one or more of them, whether one who is not so barred owing to minority can execute the decree for the benefit of all or, if not, for his own benefit alone?" In other words, whether the minority of one of several joint decree-holders saves the execution of the decree from being time-barred during the minority of the minor *plus* three years.

In the case in which the order of reference was made, the material facts and dates were as follow:—On June 30th, 1892, a joint decree was passed in favour of three brothers who, at the date of the decree, were all minors. On January 8th, 1896, the last application for execution previous to the present application

(1) I.L.R., 20 Calc., 714

(2) L.R., 10 I.A., 4, 1 L.R., 9 Calc., 192 at p. 494

(3) I.L.R., 15 Mad., 343.

(5) I.L.R., 6 Calc., 591.

(7) 3 Calc., L.R., 513.

(9) I.L.R., 3 Mad., 79.

(4) I.L.R., 10 All., 570

(6) I.L.R., 18 Mad., 464.

(8) I.L.R., 5 All., 27.

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was made. At this date two of the brothers had attained majority and one was a minor. On February 25th, 1899, the present application was made. The youngest brother had attained majority less than three years before the application.

The first question for determination is—Are joint execution-creditors “joint creditors” within the meaning of section 8 of the Limitation Act? In my opinion they are not. This view has been adopted by all the High Courts. See *Seshan v. Rajagopala*(1), *Anando Kishore Dass Bakshi v. Anando Kishore Bose*(2), *Zamir Hasan v. Sundar*(3), and *Govindram v. Tata*(4).

As regards section 7 I think the section only applies where all the joint execution-creditors were under disability at the time the period of limitation began to run. With reference to this point the Madras decisions are in conflict with those of the other High Courts. In the case of *Gowndram v. Tata*(4) their Lordships say, “Under the provisions of section 231 of the Civil Procedure Code, the minor was entitled equally with the other judgment-creditors to apply for execution of the whole decree for the benefit of all the decree-holders; and as he was a minor when the decree was passed, and when the last application for execution was made, he is entitled to the benefit of section 7 of the Limitation Act, and can apply for execution within three years of attaining majority”; and they held that the reasoning in *Perry v. Jackson*(5) did not touch the point “inasmuch as section 7 applies to an application like the present one which any one of the judgment-creditors may present by himself under the provisions of section 231 of the Civil Procedure Code.” Now, section 231 merely empowers the Court, where there is a joint decree in favour of more persons than one, to make an order, on the application for execution of one or more of the joint decree-holders for the benefit of all, for protecting the interests of the persons who have not joined in the application if the Court sees sufficient cause for allowing the decree to be executed. I do not see how a rule of procedure such as this can be prayed in aid for the purpose of construing the words “persons entitled to . . . make an application” in section 7 of the Limitation Act. It seems to me these words mean a person

(1) I.L.R., 13 Mad., 236.

(3) I.L.R., 22 All., 199.

(5) 4 T.R., 519.

(2) I.L.R., 14 Cal., 50.

(4) I.L.R., 20 Bom., 383.

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entitled to make an application on his own behalf, and that their meaning is not affected by the fact that by a rule of procedure the Court has a discretion, in a certain case, to make an order which shall enure for the benefit of parties who have not joined in the application. The word in section 7 of the Limitation Act is "entitled." That means entitled as of right. The phraseology of section 231 of the Code shows clearly that the order which by that section the Court, in the exercise of its discretion, is empowered to make, cannot be asked for as of right. In the case of *Zamir Hasan v. Sundar*(1), the Court upon this point concurred with the Bombay decisions above referred to, and the Calcutta decisions (*Lolit Mohun Misser v. Janohy Nath Roy*(2) and *Norendra Nath Pahari v. Bhupendra Narain Roy*(3)) are to the same effect.

The question has again been recently considered by the Calcutta High Court in the case of *Surja Kumar Dutt v. Arun Chunder Roy*(4) and the learned Judges re-affirm the view which had been taken by the Calcutta High Court and dissent from the Madras decisions. I have carefully considered the reasoning on which their decisions are based, and, with all deference to the learned Judges of the other High Courts, I am of opinion that the cases of *Seshan v. Rajagopala*(5) and *Vigneswara v. Bapayya*(6) were, as regards the point in question, rightly decided.

There remains the question when does the period of limitation for the execution of the decree begin to run. I am unable to adopt the view taken by the learned Judges in the case of *Lolit Mohun Misser v. Janohy Nath Roy*(2) that if the person entitled to execution is under a disability at the time when any one of the starting points referred to in the third column of article 179 commences, the operation of the Limitation Act is suspended during the continuance of the disability. It seems to me that the effect of paragraphs 2, 3, 4, 5 and 6 of the fourth column is to fix one starting point in the events referred to respectively in these paragraphs, and not to leave it open to the party who seeks the benefit of section 7 to select his own starting point. It seems to me clear that where there has been an application according to law

(1) I.L.R., 22 All., 190.

(3) I.L.R., 23 Cal., 371

(5) I.L.R., 13 Mad., 236.

(2) I.L.R., 20 Cal., 711.

(4) I.L.R., 28 Cal., 465.

(6) I.L.R., 16 Mad., 436.

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to the proper Court for execution, the period begins to run from the date of that application. The first paragraph of column 3 of article 179 of the second schedule to the Limitation Act provides the time when in the absence of the circumstances referred to in the succeeding paragraphs the period begins to run—that is the date of the decree. Paragraph 4 of the 3rd column says expressly that where there has been an application for execution in accordance with law, the period begins to run from the date of the application. This is one of the exceptions engrafted on the general rule laid down in the first paragraph

The facts of the present case come within the exception. I think the application made in 1896 was “in accordance with law” although it may have been informal, and when the application was made, all the joint decree-holders were admittedly not under disability. Explanation 1 to the 3rd column of article 179 states that if the decree is a joint decree in favour of more persons than one an application by one of such persons provides a fresh starting point in favour of all, but the explanation throws no light on the question whether, if, at the time the Statute begins to run from the fresh starting point, some of the persons are under disability and some are not, the persons not then under disability are entitled to the benefit of section 7 of the Act.

In the present case the decree was a joint decree and it seems to me that it is no longer executable as a joint decree, and I see no reason for holding that, although it is not executable as a joint decree, it is executable *quoad* the interest of one of the decree-holders, that is as a decree under which the interests of the joint decree-holders have become severed.

DAVIES, J.—I concur.

BENSON, J.—I concur.

MOORE, J.—I concur.

BHASHYAM AYYANGAR, J.—In my judgment in Appeal No. 28 of 1900 decided on the 28th August 1901, (*Ahinsa Bibi v. Abdul Kader Sahib*(1)) I had to consider the application of sections 7 and 8 of the Limitation Act to a suit for an account and a share of the profits of a dissolved partnership brought by the legal representatives of a deceased partner, one of whom was a minor at

(1) I L R., 25 Mad., 26 at p. 28.

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the time of the death of that partner. In expressing my concurrence with the decision of this Court in *Seshan v. Rajagopala*(1) in so far as it bears upon the construction of section 7 taken by itself and independently of section 8, I stated as follows:—"In cases in which the right of suit vests jointly in a plurality of persons I am clearly of opinion that if section 7 stood by itself and section 8 had not been enacted, the protection given by section 7 will extend only to cases in which each and all of the persons jointly entitled to sue were affected by disability at the time from which the period of limitation is to be reckoned and that if any one of them was then free from disability, the suit would be governed by the ordinary law of limitation and section 7 cannot be availed of by all or any of them for the simple reason that the cause of action is a joint one." Adverting then to section 8, I stated that though it did not expressly provide, (as the latter part of the corresponding section 8 of Act IX of 1871 did) "that in a case in which one or some alone of the persons entitled to sue were affected by disability at the time when the cause of action accrued jointly to all the persons entitled, time will not run against any of them if a complete discharge of the obligation could not be given by one or more of the persons free from disability without the concurrence of the person or persons labouring under disability," yet that was necessarily implied in the former part of the section. I then deduced the following propositions from the combined operation of sections 7 and 8 in a case in which the right of suit resides jointly in a plurality of persons:—" (a) such suit cannot be barred in part in respect of some and not barred in part in respect of the others; (b) if any one of several joint creditors or claimants is under a disability and a full discharge could be given without his concurrence by all or any of the other joint creditors or claimants, the suit will be governed by the ordinary law of limitation and time will run against all; (c) but where no such discharge can be given, time will not run against any of them until all have ceased to be under disability; (d) if all were affected by disability, time will not run against any of them until all have ceased to be under disability, unless one of them, who in the meanwhile has ceased to be under disability becomes capable of giving a complete discharge without the

(1) I.L.R., 13 Mad., 236.

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concurrence of the others, in which latter case, time will run against all from the time when one of them has thus become capable of giving such discharge [illustration (b) to section 8, Cf. *Anando Kishore Dass Bahshi v. Anando Kishore Bose*(1)].”

As the deceased partner was governed by the Muhammadan Law, I held that none of his legal representatives who were co-heirs was, within the meaning of section 8, competent to give a discharge which would bind the minor heir and that therefore the third of the above propositions, viz. (c), was applicable to the suit and that the same was therefore not barred by the Law of Limitation.

The question referred to the Full Bench in the present case involves the application of sections 7 and 8 of the Limitation Act to the execution of a decree awarding a sum of money to three brothers, members of an undivided Hindu family, who being all minors were represented by their mother as next friend. The decree was passed on the 30th June 1892 when all the three joint decree-holders were minors. The present application for execution was made on the 25th February 1899 by all the three brothers as joint decree-holders, having all attained their majority by that time, the youngest and he alone within three years prior thereto. The last preceding application for execution was made more than three years prior to the present application, i.e., on the 8th January 1896, when two of the brothers had attained majority and the youngest alone was a minor. For the purposes of this reference, I shall assume that that application was made in accordance with law.

The question referred is whether the youngest brother can execute the decree for the benefit of all, or if not, whether he can execute it for his own benefit alone. If joint decree-holders are “joint creditors” within the meaning of section 8, it will follow, in my opinion, that the application of the 25th February 1899 is not obnoxious to the Law of Limitation whether the same be regarded as an application for execution of the whole decree made by the youngest brother alone under section 231, Civil Procedure Code, or by all the three brothers jointly, inasmuch as no discharge of the decree could validly be given either by the senior of the major brothers or by both without the concurrence of the youngest.

(1) I.L.R., 14 Cal., 50 at p. 53.

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Section 257, Civil Procedure Code, expressly provides that all money payable under a decree, should be paid, unless otherwise directed by the decree, either (a) into the Court whose duty it is to execute the decree, or (b) out of Court to the decree-holder. I need hardly add that the expression "decree-holder" in the singular will include also the plural and if the decree be in favour of two or more persons as joint decree-holders, the amount should be paid to all of them (*Tarruck Chunder Bhattacharjee v Divendro Nath Sanyal*(1)) just as if the amount were paid into Court it will have to be drawn from the Court by all of them under a joint receipt. Even assuming that, as held in *Barber Maran v. Ramana Goundan*(2) a release by one of several joint promisees without the knowledge or concurrence of the others, will, under the Indian law, bind such others, such a doctrine will not be applicable to the case of judgment-creditors in regard to whom the processual law as laid down in section 257, Civil Procedure Code, will have to be strictly observed. A payment made out of Court only to one of several joint decree-holders cannot bind the others unless he was also constituted, by them, an agent for the purpose, in which case alone the payment can be recorded as certified under section 258, Civil Procedure Code. The mere fact that one of the joint decree-holders is the managing member of an undivided Hindu family consisting of the joint decree-holders will not empower him to give a valid discharge of the decree-debt, without the concurrence of the remaining members, any more than it will empower him to execute the whole decree, as of right, without the concurrence of the remaining decree-holders. Under section 231, Civil Procedure Code, any one of several joint decree-holders, constituting a Hindu family, whether he be the managing member or not, may, if the Court sees sufficient cause, be allowed to execute the whole decree and in that case the Court should pass such order as it deems necessary for protecting the interests of the persons who have not joined in the application. As a general rule such order will be a direction to the applicant for execution to furnish sufficient security for the protection of the interests of such persons. If payment be made, out of Court, to a sole decree-holder or several joint decree-holders, as the case may be, such payment will of course be a sufficient discharge of the decree-debt [vide section 259

(1) I L R., 9 Calc., 831 at p. 835.

(2) I L R., 20 Mad., 481.

(b)] and it is not the act of the Court in recording such payment as certified that operates as a discharge, as held in *Seshan v. Rajagopala*(1) and *Zamir Hasan v. Sundar*(2). Under section 258, Civil Procedure Code, the act of the Court simply consists in recording satisfaction, if the decree-holder or decree-holders certify to the Court payment to them out of Court or if such payment is proved by the judgment-debtor, adversely to the decree-holder or decree-holders, within the time prescribed by article 173A of the 2nd schedule to the Limitation Act. A discharge not so recorded cannot be recognized by the Court executing the decree, since, for purposes of executing the decree, such record is by Statute made indispensable evidence for proving the alleged discharge. But payment to one or some of several joint decree-holders cannot operate as a discharge of the decree-debt, nor be recorded as certified under section 258, Civil Procedure Code, unless, of course, such person or persons were duly authorised by the others to accept such payment in entire or partial satisfaction of the decree. In the case of a sole decree-holder or one of several joint decree-holders being a minor, his next friend or guardian for the suit, whoever he may be, cannot, under section 461, Civil Procedure Code, without obtaining leave of the Court and as a general rule also furnishing security, receive any money payable under the decree solely to the minor or to him jointly with the other decree-holders.

It has been held by all the High Courts (*Seshan v. Rajagopala*(1); *Govindram v. Tatia*(3); *Anando Kishore Dass Bakshi v. Anando Kishore Bose*(4) and *Zamir Hasan v. Sundar*(2)) that section 8 of the Limitation Act is not applicable to execution-creditors and I fully concur in that view, though if I understand aright the reasoning on which it is based, I must, with all deference, say that the reasoning does not warrant the conclusion arrived at, but would lead to the opposite conclusion. My reasons for holding that execution-creditors are altogether outside the scope of section 8 are that they were so under the corresponding section 8 of Act IX of 1871, and that though the said section was altered by Act XV of 1877, in respect of its latter half,—which is necessarily implied by the first half by substituting in place of the latter half a

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(1) I L.R., 13 Mad., 236 at p. 240

(3) I L.R., 20 Bom., 383.

(2) I L.R., 22 All., 199 at p. 203.

(4) I L.R., 11 Cal., 50.

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proviso that limitation is to commence from the time when one of several joint creditors or claimants who were all labouring under disability becomes capable of giving a discharge, thus modifying section 7,—yet, its scope was not extended as in the case of section 7. The corresponding section 7 in Act IX of 1871 was confined to suits only and section 8 in that Act could therefore relate only to suits. When Act XV of 1877 was passed the scope of section 7 was enlarged by including therein “applications” also, the result of which was that so far as section 7 was concerned, as in the case of suits, so in the case of applications, if the person or persons entitled to make the application were, at the time from which the period of limitation was to be reckoned, all under disability, that application could be made within the period prescribed, after all of them had ceased to be under disability. If the Legislature intended to give a similar extension to the scope of section 8, the expression “when one of several joint creditors or claimants is under any such disability,” may naturally be expected to have been altered into “when one of several joint creditors or claimants or one of several persons jointly entitled to make an application is under any such disability.” The absence of such or similar alteration clearly shows that execution-creditors and persons entitled to make applications during the course of a suit were not brought within the purview of section 8. The reason seems to me to be obvious. Whether or not one of several joint creditors or claimants can, according to the general law or the personal law governing them, give a discharge binding upon the others—which is the criterion on which section 8 proceeds—can well apply to claims or obligations for the enforcement of which, suits have to be brought; but in the case of applications which are governed by processual law such a criterion is inapplicable inasmuch as one of several persons entitled jointly to make an application, can, without the concurrence of the others, give no valid discharge binding upon all, in respect of the matter of the application.

The word “creditor” in its general sense denotes a person “who has a right by law to demand and recover of another a sum of money on any account whatever” (Anderson’s ‘Dictionary of Law’ at page 291) and standing by itself I doubt if it includes a “judgment-creditor” or an “execution-creditor,” the former denoting “one whose claim has been merged into a judgment against his debtor and under which generally execution may be

had" and the latter "a creditor who has obtained a levy upon property belonging to his debtor."

Section 8 being for the above reasons inapplicable to an application for execution presented by decree-holders, the only question which has now to be considered is whether with reference to section 7 of the Limitation Act, the application is or is not barred under article 179.

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The first question which presents itself upon the facts of this application is the determination of the date referred to respectively in the various clauses in column 3 opposite article 179 of the 2nd schedule, from which date the period of limitation is to be reckoned. The dates referred to in clauses 2, 3, 5 and 6 are, upon the facts already stated, inapplicable to the present case. If it were optional with the decree-holders to elect the date referred to in clause 1, *i.e.*, the date of the decree (30th June 1892) when they were all minors, in preference to the date referred to in clause 4, *i.e.*, the date of the last preceding application (8th January 1896) when only one of them was a minor, the matter is simple enough and according to the decisions of all the High Courts the present application, which was made within three years after the youngest brother attained the age of majority, will not be barred by the law of limitation. The different dates, subsequent to the date of the decree, referred to in the various clauses of article 179 as the starting point from which the period of limitation is to be reckoned, being evidently intended for the benefit of the execution-creditors, I was at first inclined to the opinion that they might forego the privilege and elect the date of the decree itself, if by reason of section 7 it were in the particular case more beneficial to them to reckon the period of limitation from the date of the decree sought to be executed instead of from a later date, *i.e.*, the date of the last preceding application. Such view certainly would remove the anomaly of placing a decree-holder in a worse position by reason of an application for execution having once been made on his behalf or by a joint decree-holder than if no such application has ever been made. But such view will, I find, produce even greater anomalies in other cases. If the decree-holder or decree-holders were to have the option of choosing any of the dates referred to in the various clauses, he or they might choose the date of the original decree, when he or they were all under disability, in preference to the date of the final decree of the Appellate Court (confirming the original decree) when he or one or some of them

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may have ceased to be under disability. The contingency that the reckoning of the period of limitation from an earlier date may, in some cases, be more favourable to execution-creditors than from a later date, was most probably not in the contemplation of the Legislature when article 179 was enacted; and after a full consideration of this question, which was not fully argued, and having regard to the relative anomalies which inevitably present themselves in either view, I have come to the conclusion that for the purpose of section 7, the time from which the period of limitation is to be reckoned should be the latest (applicable to the case) of the various dates referred to in the clauses of article 179. The execution-creditor or creditors can claim the benefit of section 7 only if he or they, as the case may be, were all under disability at that date. In the present case therefore the starting point for reckoning the period of limitation should be taken to be the date of the last preceding application, *i.e.*, 8th January 1896, assuming, of course, that that application had been made in accordance with law.

As already stated, only one of the three joint decree-holders was then under disability. Viewing the question from this standpoint there is a direct conflict between the decisions of this Court and those of the High Courts of Calcutta, Bombay and Allahabad. In the latest case on the point (*Surya Kumar Dutt v. Arun Chunder Roy*(1)) the Chief Justice of the Calcutta High Court and Bonnerji, J., in dissenting from the decisions of this Court in *Seshun v. Rajagopala*(2), *Vigneswara v. Bapayya*(3) and *Narayanan Nambudri v. Damodaran Nambudri*(4)—in all of which it was held, following the construction placed by Lord Kenyon in *Perry v. Jackson*(5), on the proviso to the Statute of James I and section 4 of 3 and 4 William IV, cap. 42, that section 7 of the Indian Limitation Act applies only to cases in which either there is one decree-holder and he is a minor or in which all the joint decree-holders are minors or labour under some other disability—distinguish the said English Statutes from section 7 of the Indian Limitation Act, by pointing out that in the former the expression is 'If any person or persons, etc.', whereas in the latter the expression is 'If a person entitled to institute a suit or

(1) I L.R., 28 Cal., 405

(3) I L.R., 16 Mad., 436.

(5) 4 T.R., 519.

(2) I L.R., 13 Mad., 236

(4) I L.R., 17 Mad., 189.

make an application be, etc.' With all respect to the learned Judges who took part in the above decision, I must say, the phrase 'if a person' in the Indian Act is, by virtue of the General Clauses Act, the same as the expression 'if any person or persons' occurring in the English Statute.

This decision of the Calcutta High Court as well as a former decision of the same Court in *Anando Kishore Dass Bakshi v. Anando Kishore Bose*(1) and the decisions of the Bombay and Allahabad High Courts in *Gorindram v. Tutia*(2) and *Zamir Hasan v. Sundar*(3), all relate to joint decree-holders, one or some of whom alone were labouring under the disability of minority at the time from which the period of limitation had to be reckoned. It was held in all these cases that section 8 was inapplicable to the case, but that under section 7 the application made by a minor decree-holder, within three years after he attained majority, for execution of the whole decree under section 231, Civil Procedure Code, was not barred by the law of limitation, though more than three years had elapsed since the date of the last preceding application, inasmuch as the applicant was labouring under a disability at the date of the last preceding application. The *ratio decidendi* of these decisions seems to be that by virtue of section 231, Civil Procedure Code, each one of several joint decree-holders is competent to make an application for the execution of the whole decree, that therefore even if one of them alone was a minor at the date of the decree or of the last preceding application as the case may be, he is a person entitled to make an application for the execution of the whole decree and having been, at the time from which the period of limitation is to be reckoned, a minor, he could have the benefit of section 7, if he applies for execution of the whole decree, within three years after he attains the age of majority, though the other decree-holders would, at that time, be barred by limitation from applying for execution of the decree. With all deference I find it impossible to adopt this conclusion or the reasoning on which it is based. Section 231, Civil Procedure Code, is only a rule of procedure which enables one of several joint decree-holders to make an application for the execution of the decree on behalf of and for the benefit of all the joint decree-holders and if the Court sees sufficient cause for allowing the decree

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(1) I.L.R., 14 Calc., 50.

(2) I.L.R., 20 Bom., 383.

(3) I.L.R., 22 All., 199.

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to be executed on an application so made. The contingency that orders for protecting the interests of the claimant on an earlier date not joined in the application. In my opinion 'a person other than to institute a suit or make an application' within the meaning of section 7, is one, who, in his own right, is thus entitled, and not a person who under a statutory provision is authorised, with the permission of the Court, to institute a suit on behalf of himself and others having an interest in the suit (section 30, Civil Procedure Code), or make an application for execution for the benefit of himself and others interested jointly with him in the decree to be executed, subject to the permission of the Court to allow him thus to execute the decree (section 231, Civil Procedure Code). The logical result of the reasoning on which the above decisions seem to be based would practically be that if two or more persons are jointly entitled to institute a suit and one of them alone was under disability when the right to sue accrued, he could institute the suit within three years after he attained majority by joining the others as co-defendants, though they would be barred by limitation if they had then instituted the suit. In the sense in which one only of several joint decree-holders is entitled to apply for execution of a decree on behalf of all, one only of several joint promisees or creditors is entitled to institute a suit, joining the others as co-defendants along with the debtor. But, for purposes of limitation, neither the application nor the suit would be within time unless the application, if jointly made, or the suit, if jointly instituted by all, would be within time.

No doubt, as observed in *Anando Kishore Dass Bakshi v. Anando Kishore Bose*(1), the bar of limitation to the execution of a decree bars only the remedy; the right is not extinguished. But if, as therein assumed, the remedy of certain decree-holders be barred, it is difficult to see on what principle they can recover their portion of the decree-amount from the decree-holder who executes the whole decree and whose remedy so to execute the decree is assumed not to be barred by the law of limitation. Under section 231, Civil Procedure Code, it is obligatory on the Court, if it sees sufficient cause to permit the execution of the whole decree on application made by one of the joint decree-holders, to pass such orders as may seem necessary to protect the interests of the remaining joint decree-holders. If their

(1) I L R., 14 Calo., 50 at p. 55.

remedy to realize their interests under the decree has already been barred no orders could be passed for protecting the same. Suppose the joint decree-holder, who, it is assumed, could make an application for the execution of the whole decree, though it is assumed that the remaining decree-holders are barred from making such application, does not choose to apply for the execution of the decree or chooses to apply only for a partial execution of the decree, or receives payment out of Court,—have the remaining joint decree-holders any remedy as against him? Section 231, Civil Procedure Code, proceeds on the footing that the joint decree which is sought to be executed by any one or some of the joint decree-holders and not by all is not barred by limitation either in whole or in part and that therefore the Court may, if it sees sufficient cause, allow the whole decree to be executed for the benefit of all, on application made by only one or some of them, due provision being made for protecting the interests of the others

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Explanation 1 to article 179 makes it clear that where a decree has been passed jointly in favour of more persons than one and not severally, distinguishing portions of the subject-matter payable or deliverable to each, the decree cannot be barred in part, as against some, but must be barred in whole against all, or not at all against any. Both sections 7 and 8 of the Limitation Act proceed on the same principle. For purposes of giving a fresh starting point for reckoning the period of limitation under article 179 an application for execution made by any one of several joint decree-holders will, under explanation 1, enure to the benefit of them all.

A joint decree may, no doubt, sometimes become divisible and executable in part, to the extent of such severance, when by operation of law or by act of parties, the judgment-debtor has acquired the interest of one or some of the joint decree-holders in the decree, and thus a partial satisfaction or extinguishment of the decree takes place (*Banarsi Das v. Maharam Kuar*(1) and *Kudhai v. Sheo Dnyal*(2)). But as no such contingency is alleged to have happened in the present case, I do not consider the decisions which were cited by the learned pleader for the respondent (*In the matter of the Petition of Kally Soondery Dabua* (3); *Hurrish Chunder Chowdhry v. Kali Sundari Debia*(4); *Tarruck*

(1) I.L.R., 5 All., 27.

(2) I.L.R., 10 All., 570.

(3) I.L.R., 6 Calc., 594. | (4) L.R., 10 I.A., 4, I.L.R., 9 Calc., 482 at p. 494.

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AYYAN. *Okhunder Bhattacharjee v. Divendro Nath Sanyal*(1); *Sultan Moideen v. Savalayammal*(2); *Muthusami Ayyar v. Natesa Ayyar*(3) in support of his alternative contention that the decree can be executed if at all only to the extent of the youngest brother's interest in the decree-debt, *i.e.*, an one-third share to which he would be entitled in a partition between himself and his elder brothers.

Assuming that the facts bearing upon the question referred to the Full Bench are as set forth at the beginning of this judgment and that the last preceding application for execution was made in accordance with law, my answer is that the present application for the execution of the decree, whether that be regarded as one made by all the three brothers as joint decree-holders or, under section 231, Civil Procedure Code, by the youngest brother alone for the benefit of all or as one made by him for the recovery of his alleged one-third share therein, is barred by the law of limitation, but that if the last preceding application was not made in accordance with law and the starting point for reckoning the period of limitation is therefore the date of the decree, the present application, whether it be one made by all the three brothers or under section 231, Civil Procedure Code, by the youngest of them alone, is not barred by limitation either in whole or in part.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

1901.
October 10,
25.

RAMASAMI CHETTI AND ANOTHER (DEFENDANTS), APPELLANTS,
v.

PARAMAN CHETTI (PLAINTIFF), RESPONDENT.*

Specific Relief Act—Act I of 1877, s. 9—Suit for land based on title—Claim of title set up in defence—Suit treated by Court partly as summary suit for possession under section 9 and partly as a suit based on title—Rights of parties to have question of title tried and decided—Practice.

Plaintiff sued to eject defendants from certain land, claiming title to it by purchase, and alleging that he had been forcibly dispossessed by defendants.

(1) I.L.R., 9 Cal., 831.

(2) I.L.R., 15 Mad., 343.

(3) I.L.R., 18 Mad., 464.

* Second Appeal No. 303 of 1900 against the decree of H. Moberly, Acting District Judge of Madras, in Appeal Suit No. 292 of 1899, affirming the decree of V. K. Desika Chariar, District Munsif of Periyakulam, in Original Suit No. 90 of 1899.

The defendants denied both plaintiff's title and possession and set up title in themselves and alleged that they had long been in possession. The District Judge found that plaintiff had failed to prove a title by purchase, but had shown that he had been dispossessed otherwise than by due course of law, by defendants, within six months prior to the institution of the suit. He considered that section 9 of the Specific Relief Act applied and declared plaintiff entitled to possession, but dismissed the suit in so far as it claimed to have plaintiff's title established

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Held, that inasmuch as the suit had not been brought under the special provisions of the Specific Relief Act, but was based on plaintiff's superior title, a claim to title being also set up in defence, the issue concerning title should have been tried. The suit ought not to have been treated partly as a suit under section 9 and partly as based on plaintiff's title

Ram Harakh Rai v. Sheodihal Joti, (I.L.R., 15 All., 384), not followed.

SUIT in ejectment. Plaintiff claimed title to the land in question by right of purchase, and alleged that defendants had trespassed upon and forcibly ousted him from it. Defendants denied that plaintiff had purchased the land, or that he had any title to it, or that it had been in his possession or that of his alleged vendors. They also denied that they had forcibly ousted plaintiff, and claimed title to the land by purchase and alleged that they had been in possession of it themselves for over twelve years. The Munsif upheld plaintiff's title and declared him to be entitled to possession of the land. On appeal, the District Judge said :—

“The District Munsif has decreed in favour of plaintiff, so the first point for determination is whether an appeal lies against so much of the decree as declares that plaintiff do recover possession of the suit land. According to the ruling in *Ram Harakh Rai v. Sheodihal Joti*(1), the Court should give effect to the first paragraph of section 9 of Act No. 1 of 1877 in all cases to which it applies. The District Munsif has found that plaintiff was dispossessed in October 1897. Although I cannot say that the evidence convinces me that plaintiff was dispossessed in October 1897 still I am satisfied that the suit was brought within six months from the date of dispossession. Following, therefore, the Allahabad High Court's ruling I must hold that an appeal does not lie against so much of the decree as declares plaintiff entitled to recover possession of the land. So far as the decree of the District Munsif may be regarded as a decree establishing the plaintiff's title to possession as purchaser of the land, I must set it aside, as plaintiff has certainly failed to make out a good title.”

(1) I.L.R., 15 All., 384.

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In the result, the decree was allowed to stand in so far as it was a decree for possession; but was set aside in so far as it established plaintiff's title, and the suit was dismissed in so far as it was a suit asking for the establishment of plaintiff's title.

Defendants preferred this second appeal.

Seshagiri Ayyar for appellants.

K. Srinivasa Ayyangar for respondent.

JUDGMENT.—The plaintiff brought this suit to recover possession of the plaint lands with mesne profits from defendants alleging that he had purchased the lands from the former owners and had been unlawfully ousted from them by the defendants.

The defendants denied that plaintiff had any title to the land or any possession. They denied the alleged trespass and alleged that they had themselves been in possession for many years and had a title to the lands.

Issues were framed on these allegations and were all found in plaintiff's favour by the District Munsif who accordingly gave plaintiff a decree for possession and for past and future mesne profits. On appeal, the District Judge found that plaintiff had failed to prove a valid purchase from the former owners, but had shown that he had been dispossessed otherwise than by due course of law by the defendants within six months prior to the institution of the suit. He therefore confirmed the decree of the District Munsif so far as it restored plaintiff to possession and awarded him mesne profits, but he reversed it so far as it established plaintiff's title and dismissed the plaintiff's suit in that respect.

The defendants appeal.

We think that the second appeal is well founded. The suit as laid by the plaintiff is a suit in ejectment and is founded on plaintiff's title. It is not a suit brought under the special provisions of section 9 of the Specific Relief Act. The plaintiff might, no doubt, have brought his suit to recover possession under that provision of law, and had he done so he would have been entitled to a decree for possession on proof of his unlawful dispossession by the defendants within six months of the institution of the suit, and the defendants would not have been allowed to plead a superior title. The question of title would have been immaterial, and no appeal could have been brought against any order or decree made in the suit. But the plaintiff did not bring his suit

under that section He based his suit on his superior title. The defendants denied that title and set up their own title, and we think that the issues thus raised between the parties should have been tried by the District Judge. We do not think that he ought to have regarded the suit partly as a suit under section 9 of the Act, and partly as a suit based on plaintiff's title. To do so must, in our opinion, lead to inconvenience and inconsistency. In a suit under section 9, no question as to title on either side can be raised and no appeal is allowed. In a suit based on plaintiff's title, the title on both sides may be gone into, and the decision of the original Court is open to appeal and second appeal. In the present suit the District Judge has, indeed, gone into the plaintiff's title and given a decision against it, but has given no decision as to the defendant's title. The plaintiff and the defendants by their pleadings raised the question of the defendant's title and if it is a good title, we can see no reason why the defendants should not have it established in this suit instead of being driven to another suit to do so. No doubt the District Judge's treatment of the case is in accordance with the law as laid down in the case of *Ram Hurukh Rai v Sheodhal Jot*(1), but with great respect for the learned Judges who decided that case, we are, for the reasons stated by us, unable to follow it. We may add that the District Judge has decided against the validity of the plaintiff's title by purchase on the ground apparently that there was no delivery of the land to plaintiff by his vendors but it is not easy to reconcile this view with plaintiff's possession and dispossession in 1897 as found by the District Judge. We must set aside the decree of the District Judge and remand the appeal for decision in accordance with law. Costs in this second appeal and in the lower Appellate Court will be provided for in the fresh decree of the lower Appellate Court.

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(1) I.L.R., 15 All., 384.

APPELLATE CIVIL.

*Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.*1901.
October 28.

KELAPPAN (DEFENDANT No. 2), APPELLANT,

v.

MADHAVI AND OTHERS (PLAINTIFFS AND DEFENDANT No. 1),
RESPONDENTS.**Malabar Law—Kuikanom lease for indefinite period—Customary law as to duration of lease—Limitation Act—Act XV of 1877, sched. II, art. 139.*

By the customary law of Malabar, a tenant under a kanom or kuikanom lease, is entitled not to be redeemed or ejected until the expiration of twelve years. But where no time is fixed for the duration of the lease it does not, under the customary law, determine on the expiration of twelve years from its date.

A kuikanom lease was granted in 1873, no time being fixed for its determination. In 1899, a suit was brought to recover the land, on payment of the value of improvements, when the defence of limitation was set up. It was contended that the kuikanom lease determined, by the customary law of Malabar, twelve years from its date, namely in 1885, and that as the suit had not been instituted within twelve years of that date, it was barred under article 139 of schedule II to the Limitation Act:

Held, that the suit was not barred.

Suit to recover a paramba, on payment of the value of improvements. A kuikanom lease of the land had been granted in 1873, no time being fixed for its determination. The defence of limitation was set up, but the Munsif held that the suit was not barred and decreed in plaintiff's favour. The District Judge on appeal confirmed that decree.

Defendant No. 2 preferred this second appeal.

J. L. Rosario for appellant.

Ryru Nambiar for respondents Nos. 1 and 2.

JUDGMENT.—Two grounds are urged before us in support of the second appeal.

The first is that the memorandum of Second Appeal No. 675 of 1884 preferred by one of the three defendants was confined to that portion alone of the property comprised in the suit in which the defendant was interested, and that therefore the

* Second Appeal No. 571 of 1900 against the decree of A. Thompson, District Judge of North Malabar, in Appeal Suit No. 152 of 1899, affirming the decree of M. Mundappa Bangora, District Munsif of Tellicherry, in Original Suit No. 51 of 1899.

reversal of the lower Appellate Court's decree and the restoration of the decree of the Court of First Instance by the High Court should be construed as limited only to such portion. This point was not taken in the lower Courts and we cannot allow it to be now set up, as it involves a question which cannot be determined without admitting additional evidence.

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The second point urged is that the plaintiff's suit is barred by limitation, under article 139 of the Limitation Act, as it was not brought within twelve years from 1885 when it is contended that the kuikanom lease granted in 1873 determined by efflux of the time limited by the lease. There is no time fixed in the lease, and we are not prepared to say that a kuikanom lease, in which no term is fixed, is determined on the expiration of twelve years from its date. The customary law of Malabar requires that a tenant under a kanom or kuikanom lease should not be redeemed or ejected until the expiration of twelve years from its date, but it does not determine the lease at the expiration of the twelve years.

The second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Davies.

VENKATA PAPAYYA RAO (PLAINTIFF), APPELLANT,

v.

VENKATA SUBBAYYA (DEFENDANT), RESPONDENT.*

1901.
October 29.

Rent Recovery Act (Madras)—Act VIII of 1865, ss. 10, 69—Adjudication that plaintiff has failed to prove default by defendant—"Judgment"—Appeal.

An order passed under section 10 of the Rent Recovery Act which amounts to an adjudication that the plaintiff has failed to prove default on behalf of the defendant, is a judgment within the meaning of section 69 of the Act and an appeal lies therefrom.

Narasimhaswami v. Lakshminamma, (I.L.R., 22 Mad., 436), followed.

* Second Appeal No. 906 of 1900 against the decree of W. C. Holmes, District Judge of Kistna, in Appeal Suit No. 453 of 1899, affirming the decision of J. F. Bryant, Acting Head Assistant Collector of Kistna, in Miscellaneous Petition No. 28 of 1889, in Summary Suit No. 131 of 1899.

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Suit to eject a tenant under section 10 of the Rent Recovery Act. The Head Assistant Collector held that plaintiff had failed to prove wilful default on the part of the defendants, and dismissed the suit. Plaintiff appealed to the District Judge who, allowed a preliminary objection that no appeal lay, and dismissed the appeal.

Plaintiff preferred this second appeal.

Sivasami Ayyar for appellant.

K. Subrahmanya Sastri for respondent.

JUDGMENT.—We are prepared to follow the decision of this Court in *Narasimhaswami v. Lakshamma* (1), and we think no valid distinction can be drawn between a case where an order for ejectment is made on an application under section 10 of the Rent Recovery Act, and a case where the Collector dismisses an application for ejectment made under that section. In substance, the order of the Head Assistant Collector in the present case amounts to an adjudication that the plaintiff failed to prove default on the part of the defendant. This, in our opinion, is a "judgment" within the meaning of section 69 of the Act.

The decree of the District Judge must be set aside and the case remanded to him to be dealt with according to law.

Costs of the appeal will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1901.
October 31.

SIR RAMASAMI MUDALIAR (PLAINTIFF), APPELLANT,

v.

ANNADORAI AYYAR (DEFENDANT), RESPONDENT.*

Rent Recovery Act (Madras)—Act VIII of 1865, s. 10—Purchase at Court sale of former tenant's interest in land—Liability of purchaser for rent as from date of confirmation of sale.

Defendant had purchased at a Court sale the interest of a former tenant in certain land in a zamindari. The sale was confirmed on 31st March 1900, and

(1) I L R, 22 Mad, 430.

* Second Appeal No. 3 of 1901 against the decree of A. C. Tate, Acting District Judge of Chingleput, in Appeal Suit No. 189 of 1900, reversing the decision of P. Sivasami Ayyar, Deputy Collector of Trivellore, in Summary Suit No. 571 of 1900.

possession was given to defendant, on 11th May 1900. The landlord now sued to enforce the acceptance by defendant of patta for fasli 1309, being the year commencing on 1st July 1899 and ending on 30th June 1900. By the terms of the muchalkas which had been executed by the former tenant, rent was payable in four equal instalments, on 1st October, 1st February, 1st April and 1st May.

Held, that the defendant was liable for the instalments which fell due subsequently to the confirmation of sale, namely, on 1st April and 1st May 1900. Also, that it was immaterial, (in regard to his liability for rent), when he recovered actual possession of the land.

Suit to enforce acceptance of patta. Plaintiff, the zamindar of Egattur, sued to enforce the acceptance by defendant of patta in respect of certain land in the zamindari for fasli 1309—namely, for the year commencing on 1st July 1899 and ending on 30th June 1900. Defendant had purchased the right, title and interest of a former tenant in the land at a Court sale, which had only been confirmed on 31st March 1900, and he had been put in possession on 11th May 1900. By the terms of the muchalkas which had been executed by the previous tenant, rent was payable in four equal instalments, on 1st October, 1st February, 1st April and 1st May. Defendant contended that he was not plaintiff's tenant for the year 1st July 1899—30th June 1900, within the meaning of the Rent Recovery Act, as he had only acquired possession of the land after the cultivating season was over, and that the real tenant was his predecessor, who had cultivated the land and removed the crops.

The Deputy Collector held that plaintiff was entitled to tender the patta, and defendant was bound to accept it.

Defendant appealed to the District Judge, who reversed the decision, being of opinion that as defendant had only been in possession of the land (which was an agricultural holding) from 11th June to 30th June 1900, it would be inequitable to regard him as having been plaintiff's tenant for the year 1st July 1899—30th June 1900, and liable to pay rent for that year. He held that defendant was not bound to accept the patta.

Plaintiff preferred this second appeal.

Venkatasubba Ayyar and *Narayana Sastri* for appellant.

Mr. W. Barton for respondent.

JUDGMENT—Under section 316 of the Civil Procedure Code the title to the land in the occupancy of the former tenant vested in the purchaser at the Court sale on the date on which the sale was confirmed, that is, on the 31st March 1900. From that date

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he became the tenant of the landlord and bound to pay rent according to the customary instalments (section 55, (5) (d) of the Transfer of Property Act). Two of those instalments for the then current fasli had previously fallen due and it is clear that for neither of these instalments was the defendant liable. Two instalments fell due after that date, viz., on the 1st April and on the 1st May, and for those instalments the defendant was liable and was therefore a tenant within the definition of that word in the Rent Recovery Act. He was therefore bound to accept a patta for that fasli. The patta tendered to him made him liable for all four instalments. This he was not bound to accept. The patta, in order to be a proper one, should have limited his liability for rent to the two instalments which he was alone bound in law to pay. The patta tendered is accordingly modified by adding the following clause: "The tenant is liable to pay only the instalments of rent which fell due on the 1st April and 1st May 1900. We direct the tenant to accept the patta as thus modified and to execute a corresponding muchalka. Each party will bear his own costs throughout." We may add that in respect of the two instalments which became due before the 31st March the landlord might, before the end of the fasli, have tendered another patta to the former tenant, who was the owner up to that date, his liability for rent being limited to the first two instalments.

The date on which the new tenant (the purchaser in the Court auction) recovered actual possession from the former tenant, subsequent to the confirmation of sale, is immaterial in regard to his liability to pay rent accruing due subsequent to the confirmation of sale.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

BELL (ACCUSED), PETITIONER,

v.

THE MUNICIPAL COMMISSIONERS FOR THE CITY OF
MADRAS (COMPLAINANTS), RESPONDENTS.*

1901.
December
5, 6.
1902.
January 9.

City of Madras Municipal Act (Madras)—Act I of 1884, s. 341—Liability of Government under taxing Acts when not expressly mentioned—Prerogatives of the Crown—Indian Councils Act, 1861—24 & 25 Vict., cap. 67, s. 42.

The Superintendent of the Government Gun Carriage Factory in Madras having brought timber belonging to Government into Madras without taking out a license and paying the license fees prescribed by section 341 of the City of Madras Municipal Act, was prosecuted to conviction by the Municipal Commissioners:

Held, on revision, that timber brought into Madras by or on behalf of Government is liable to the duty imposed by section 341 of the City of Madras Municipal Act although Government is not named in the section. According to the uniform course of Indian Legislation, Statutes imposing duties or taxes bind Government unless the very nature of the duty or tax is such as to be inapplicable to Government.

Per curiam:—Under the Indian Councils Act, 1861, a Provincial Council has, subject to the same restrictions as those imposed by the Act on the Governor-General's Council, power to affect the prerogative of the Crown by Legislation.

PETITION to revise the conviction and sentence passed by the Chief Presidency Magistrate, Egmore, Madras. Petitioner was the Superintendent of the Government Gun Carriage Factory in the City of Madras. Acting in his official capacity he caused certain timber to be brought into the City of Madras without obtaining a license from the Municipality on payment of the fee prescribed by section 341 of the City of Madras Municipal Act (I of 1884). A prosecution having been instituted by the Municipal Commissioners, the defence was set up that the timber was the property of Government, that the duty, if any were payable, would be paid out of the public Indian revenue, and that a license was not necessary

* Criminal Revision Case No. 390 of 1901, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the conviction and sentence passed by J. Meredith, Chief Presidency Magistrate, Egmore, Madras, in Calendar Case No. ^{35124 A of 1900} 28768 of 1901.

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under section 341 of the Act, it being contended that the section was not applicable to Government timber. Petitioner was convicted and a nominal fine was inflicted.

Against this conviction the petitioner filed this criminal revision petition.

The Advocate-General (Hon. Mr. J. P. Wallis) for petitioner:—Three grounds are relied upon in support of the petition: first, that section 341 of the City of Madras Municipal Act is ancillary to section 338, which latter section contains an express exemption in favour of Government; second, that the notice levied by the Municipality is a toll, and the property of Government is exempted from liability to pay toll by section 174; and third, there are no express words in the section binding Government, and in the absence of express words, Government is not bound by the taxing provisions of a Statute, at any rate unless the intention to bind it is manifest and irresistible which is not the case. The present Act (I of 1884) is an amendment of Act V of 1878, the provisions relating to taxation being identical in both. Section 341 of the present Act is new and is not placed with the other taxing sections, which begin with section 93 and which contain exemptions in favour of Government. Where the king has any prerogative, title or interest it cannot be taken away by general terms; *Magdalen College Case*(1). The fact that the Madras Municipal Act contains exemptions in favour of Government in some sections, and not in section 341 does not in itself justify the conclusion that it was intended to render the Government liable to the tax under the latter section. In *Smithett v. Blythe*(2), it was held that though an Act contained an exemption in favour of the Crown from payment of tolls to a lighthouse-keeper in respect only of ships of war, yet a line of mail packets started by Government was also exempt, on the general principle that the Crown is not bound in the absence of express words. The exemption which the Act did contain had been inserted *ex abundanti cautela*. In *Westover v. Perkins*(3), a royal carriage in which the royal family were not riding was held not liable to the tax. The definition of a "toll" in Sheppard's 'Abridgment' is also given there and applies to this case. In *Mayor, &c., of Weymouth v. Nugent*(4),

(1) 11 Coke's Rep., 74b.

(2) 1 B. & Ad., 509.

(3) 2 E. & E., 57; 28 L.J., (M.C.), 227.

(4) 34 L.J., (M.C.), 81; 6 B. & S., 227.

the Statute contained two express exemptions, in favour of coal on packets, and horses and carriages; yet it was held that the effect of these was not to cut down the general immunity of the Crown, and the latter was held not liable to pay tolls on stone. The Crown is only bound by express words. See also Bacon's 'Abridgment,' Prerogative E. 5. In *Attorney-General v. Donaldson*(1), persons who were not members of the royal family, but who lived in a royal palace, were held not liable to pay sewer rates. See also *Mersey Docks v. Cameron*(2) a similar case. *Cushing v. Dupuy*(3) shows that the Privy Council has power to admit an appeal in bankruptcy from the Canadian Courts, though the Canadian Act provides that there shall be no appeal: the principle being that the prerogative of the Crown is not taken away except by express words. [He also referred to *Johnston v. Minister and Trustees of St. Andrews' Church, Montreal*(4), and *Theberge v. Laundry*(5) on the same point; and to *Wheaton v. Maple & Co.*(6), *Ex-parte Postmaster-General*(7) and *The Collector of Masulipatān v. Cavalry Vencata Narrainapah*(8).] This is a "toll," and Government is exempt from payment of tolls by virtue of its prerogative, and also under section 174 of this Act. A general definition of a "toll" is to be found in the 'Century Dictionary'; it is not confined to the privilege of passing through boundaries. Examples are given in *Westover v. Perkins*(9) such as "murage," "pavage," etc. A toll must be levied for some consideration, and here the consideration is the license—which is really a license to import. [He referred to *Ganpat Putaya v. The Collector of Kanara*(10) and *The Secretary of State for India v. Mathurabhai*(11), as to the interpretation of Indian Statutes in accordance with the general rule that the Crown is exempt; to the 'Encyclopædia of the Laws of England,' article "Toll" and to Maxwell on the 'Interpretation of Statutes,' page 188.] The exaction of money from the Crown is a divesting of the Crown estate which cannot be done without express words.

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(1) 10 M. & W., 117; 11 L.J., (Ex.), 338.

(2) 11 H.L.C., 443; 35 L.J., (M.C.), 1.

(3) L.R., 5 App. Cas., 409.

(5) L.R., 2 App. Cas., 102.

(7) L.R., 10 Ch. D., 595.

(9) 2 E. & E., 57; 28 L.J., (M.C.), 227.

(11) I.L.R., 14 Bom., 213.

(4) L.R., 3 App. Cas., 159.

(6) [1893] 3 Ch., 48.

(8) 8 M.I.A., 529 at p. 550.

(10) I.L.R., 1 Bom., 7.

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Mr. K. Brown for complainants:—Assuming the rule of construction contended for on the other side to be applicable to Indian Acts, yet on the construction of the Act the conviction is right. It is a question of construction and the question is what is the meaning of the City of Madras Municipal Act. There have been amendments of it—such as Madras Act VII of 1884, Act II of 1892, and Act II of 1901—The Indian Tolls (Army) Act, which repeals certain words in section 174. This Act is a fitter place to look to for light as to the definition of a “toll,” and the definition which it gives does not include, *inter alia*, octroi duties. There can be no doubt that the duty leviable under section 341 is in the nature of an octroi duty rather than a toll. This view is supported by reference to section 170 and to schedule D. Section 119, which imposes a tax on buildings, contains no exemption in favour of Government. Exemptions are contained in sections 138, 148, 153, 170, 174, 332 and 338; and it is the case of the other side that all of these are unnecessary. If the test is whether the intention to tax Government is manifest from this Act, I answer that it is manifest. As there are so many sections in which Government is expressly exempted, and as section 341 contains no such exemption, the fair inference as to intention is that it was intended to tax the Crown. It is also worthy of note that two of the sections containing exemptions in favour of the Crown have been amended. 2 & 3 Wm. IV, cap. 71, section 3 was under consideration in *Westover v. Perkins*(1). In that section, no mention whatever is made of the Crown, though the King is exempted by sections 1 and 2. The fact that the Crown is mentioned is not conclusive; the manner in which it is mentioned has to be regarded. [He referred to *Ex-parte Postmaster-General*(2) and to the Prescription Act, section 1 of which relates to profits, section 2 to ways, and to section 3 to light] *Wheaton v. Maple & Co* (3) proceeded on the ground that as the Crown was expressly exempted in one section and not in another, there was no intention to exempt in the latter—see at page 54. As to the other cases cited they can only be useful with reference to the terms of the Acts construed. *Ex-parte Postmaster-General*(2) only raised the question whether the Crown could insist on its

(1) 2 E. & E., 57, 28 L.J., (M.C.), 227

(2) L.R., 10 Ch. D., 595.

(3) [1893] 3 Ch., 48, at p. 54.

priority in spite of the fact that the property had become vested in the trustee for the general body of creditors. Neither this case nor *Smithett v. Blythe*(1) help the petitioner very much. The sections on which *Westover v. Perkins*(2) was decided show how little it can apply to the present case. The exemptions in 3 Geo. IV, cap. 126, section 32 and 4 Geo. IV, cap. 95, section 24, are purely personal. It was distinctly found that the carriage was being used by permission of the Queen, and was used by the equerry in the exercise of his office. The Act upon which *Mayor, &c., of Weymouth v. Nugent*(3) was decided was a private one and it is impossible to ascertain a principle of construction from the decision without reference to the terms of the Act, which are not cited. *Attorney-General v. Donaldson*(4) depended on the technical nature of the proceedings, which were peculiar to the Crown. [He also referred to Maxwell on 'Statutes,' 2nd edition, page 166; 3rd edition, page 186; *Mersey Docks v. Cameron*(5); Bacon's 'Abridgment,' Prerogative E 5.] The City of Madras Municipal Act would be within the exception of the first paragraph based upon public good; moreover, as stated in Bacon, express words are not necessary to bind the Crown if the intention to do so is manifest. *Moore v. Smith*(6) shows this: a case that is dealt with on page 191 of Maxwell on 'Statutes,' 3rd edition. Hardecastle on 'Statutes' also deals with the rule stated in Bacon at page 185 of the first edition. The questions of the existence of a prerogative, and of the existence of an intention to tax the Crown, are distinct; it has first to be considered whether there is an intention to tax. As to section 341 being ancillary to section 338, no authority has been cited for such a principle of construction. According to Lord Coke, the three kinds of Statutes which are binding on the king, though he be not mentioned, are those relating to the advancement of religion, to the interests of justice, and to the relief of the poor. But does the rule of construction contended for on the other side apply to Indian Acts? It is submitted that it does not. Sargent, C.J., in *The Secretary of State for India v. Mathurabhai*(7) differs from Westropp, J., and the *obiter dictum* of the former is directly

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(1) 1 B. & Ad., 509.

(3) 34 L.J., (M.C.), 81, 6 B. & S., 22.

(5) 11 H.L.C., 443, 35 L.J., (M.C.), 1.

(7) I.L.R., 14 Bom., 213.

(2) 2 E. & E., 57, 28 L.J., (M.C.), 227.

(4) 11 M. & W., 117; 11 L.J., (Ex.), 338.

(6) 28 L.J., (M.C.), 126.

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opposed to *Arzan v. Rakhal Chunder Roy Chowdhry*(1)—a case against the Secretary of State. [He also referred to *Appayya v. The Collector of Vizagapatam*(2) and *Ganpat Putaya v. The Collector of Kanara*(3).] Where the Indian Legislature intends to put Government and its officials on an exceptional footing, that intention is not left to be implied but is expressed, as in the Procedure Code, the Limitation Act, the Easements Act and elsewhere. Such an intention cannot be read into the Acts enabling local authorities to levy taxes and impose dues. Compare the District Municipalities Acts and the Local Boards Acts. These enactments contain provisions of general application, from certain of which Government is exempted by express language. Act XI of 1881 may be referred to on this point, and on the question of intention. This Act empowers the Secretary of State to prohibit the levy of taxes payable by him, even where there is no exemption in favour of Government. So it is part of the system that the Secretary of State should be taxed, and the Legislature has provided an easy method for preventing the levy of taxes such as that under consideration.

The *Advocate-General*, in reply, cited Lord Coke's definition of a "toll" in the second Institute, page 58, and contended that the tax imposed by section 341 was a toll within this definition, and that the definition of a toll in the Tolls (Army) Act of 1901 could not affect the question, being only for the purposes of that Act; also that the latter Act did not show when liability arose, but only defined powers which might be used after it had arisen. The intention of the City of Madras Municipal Act could not be ascertained, nor could it be legitimately construed by perusing other Statutes. He contended that section 174 governed section 341.

BENSON, J.—Major Bell, the accused in this case, is the Superintendent of the Government Gun Carriage Factory in the City of Madras. He caused certain timber to be brought into the city on account of Government without obtaining a license and paying the fees prescribed by section 341 of the City of Madras Municipal Act I of 1884, and for this act he has been prosecuted at the instance of the Municipal Commissioners and has been fined the nominal sum of one rupee.

(1) I.L.R., 10 Calc., 214.

(2) I.L.R., 4 Mad., 155.

(3) I.L.R., 1 Bom., 7.

The learned Advocate-General asks us, in the exercise of our powers of revision, to set aside the conviction and sentence as contrary to law. The object of the prosecution and of this revision petition is to obtain an authoritative decision of this Court as to the applicability of section 341 to Government timber and firewood. The section enacts that "no timber or firewood shall be brought within the city without a license specifying the place and conditions of storing, to be issued by the President under the bye-laws, on payment of a fee which should not exceed the following rates:— Timber Rs 5 per ton; firewood Re. 0-6-0 per ton."

There is nothing in the section to limit the liability of Government timber, though exemptions in favour of Government are found in several other sections of the Act. The *primâ facie* inference is that the Legislature intended to make the section applicable to such timber. The learned Advocate-General, however, contests this inference, and contends that the conviction is bad on three grounds, viz :—

"1 Because the Magistrate ought to have held that the provisions of section 341 as to taking out a license for importing wood are merely ancillary to the provisions of section 338 as to taking out a license for storing wood and that the exemption in favour of Government in section 338 applies also to section 341.

"2 Because, if as held by the Magistrate, the license fee leviable under section 341 is to be treated as a tax on importation it amounts to a toll, and Government property is expressly exempted by section 174 from payment of tolls.

"3. Because the Crown is not bound by the taxing provisions of a Statute unless there be express words to bind it, or in the absence of express words, unless the inference that it was intended to bind the Crown is manifest and irresistible, whereas on the true construction of this Statute, no such intention is anywhere to be found."

The first two grounds appear to me to be clearly untenable. The license mentioned in section 341 is quite distinct from that mentioned in section 338. The latter section requires the occupier of every place used for the sale and storage of wood and certain other inflammable materials to take out a license, just as other sections require those who keep livery-stables, slaughter-houses and bake-houses, or who exercise certain dangerous and offensive trades, to take out a license, the object being to give the Municipal authorities the power to control such places in the interest of

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the public. Section 341, properly understood, is a section which imposes an octroi or town duty under the guise of a license fee. This is manifest from the heavy incidence of the fee and from the proviso in the section for a drawback of nine-tenths of the fee in case the wood is exported, and also from the fact that the president has no discretion to refuse to grant a license. A person may import wood under section 341 without taking it to a place licensed under section 338, and a person may keep a place under section 338 without importing under section 341. I can see no reason for holding that the exemption from control in section 338 in favour of a place occupied by Government operates to exempt from taxation under section 341 the person who imports Government wood. Nor can it, with any show of reason, be said, that the exemption provided by section 174 in favour of Government as regards tolls, extends to the fee or town duty imposed by section 341. The tolls referred to in section 174 are those tolls, and those tolls alone, which the Commissioners are authorised to levy *eo nomine* by section 170 and which are specified in schedule D of the Act.

There remains the contention which was pressed upon us by the Advocate-General with much force and learning, viz., that the fees payable under section 341 are tolls, and that the Crown has a prerogative exemption as regards all tolls, and that, even if they are not "tolls," the Crown, or, in this country, the Secretary of State for India in Council as representing the Crown, is not bound by the taxing provisions of a Statute unless there be express words to bind the Crown, or in the absence of express words, unless the inference that it was intended to bind the Crown, is manifest and irresistible, and that such intention is not to be found in the City of Madras Municipal Act. He contended that no intention to render the Crown liable under section 341 can properly be inferred from the fact that in other sections of the Act Government is expressly exempted from liability and he quoted a number of English cases in support of his contention. There is, no doubt, abundant authority to show that in England the Crown is by virtue of its prerogative exempt from the payment of tolls, but it is also clear from the Indian Councils Act, 1861 (24 & 25 Vict., cap. 67) that it is competent for the Indian Legislatures to make laws which may cut down the prerogative of the Crown in certain matters. This is clear with regard to the Governor-General in

Council from section 24 which provides that "no law or regulation made by the Governor-General in Council (subject to the power of disallowance by the Crown as hereinbefore provided) shall be deemed invalid by reason only that it affects the prerogatives of the Crown"

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I had at first some doubt whether the Governors in Council of this Presidency and of Bombay are competent to make any law which shall affect the prerogative of the Crown. This doubt was caused by the absence of any section similar to section 24 in regard to the powers of these local Legislatures, and it was strengthened by finding that Sir C. Ilbert in his work on the "Government of India" (pages 223 and 226) assumed, for the same reason, that they have no such power. On further consideration, however, and after consultation with my learned colleague, I am of opinion that the local Legislatures are competent to make such a law, provided it does not affect the prerogative in regard to any matter specially exempted from their jurisdiction or from the jurisdiction of the Governor-General in Council. The authority to legislate as regards matters which affect the prerogative is not conferred on the Governor-General in Council by section 24. That authority is conferred by section 22 which gives the Governor-General in Council full legislative authority save in regard to certain specified matters, some of which affect the prerogative, and some of which do not do so. That section in substance re-enacts section 43 of 3 & 4 William IV, cap. 85, with this important difference that it omits the general words of the latter section which prohibited the Governor-General in Council from "making any laws or regulations which shall in any way affect any prerogative of the Crown." That limitation had, in the interval, been removed by section 26 of 16 & 17 Vict., cap. 95, which provided that "no law or regulation made by the Governor-General in Council shall be invalid by reason only that the same affects any prerogative of the Crown, provided," etc. Thus section 22 of the Indian Councils Act, 1861, conferred on the Governor-General in Council a general power to legislate even in matters affecting the prerogative, except in regard to certain specified matters, and section 24 was enacted *ex maiore cautela* so as to show beyond all doubt that the important change in the law made, subject to a qualification, by section 26 of 16 & 17 Vict., cap. 95 was, without any qualification, maintained in the new Councils Act, 24 & 25 Vict., cap. 67. The extent of

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the legislative powers of the Governor in Council of this Presidency and of Bombay is defined and limited in sections 42 and 43 of this Act. Under section 42 the Governor in Council of this Presidency may "make laws and regulations for the peace and good government" of the Presidency provided they shall not "affect any of the provisions of this Act or of any other Act of Parliament in force or hereafter to be in force in such Presidency." Section 43 then specifies certain matters which are not to be dealt with by the local Legislature save with the previous sanction of the Governor-General. In neither section is there any general limitation in regard to matters affecting the prerogative. The limitations imposed on the Governor-General in Council by the latter part of section 22 must necessarily be held to apply to the subordinate Legislatures of this Presidency and of Bombay, but, subject thereto and to the restrictions imposed by sections 42 and 43, a law passed by the Legislature of this Presidency for its "peace and good government" is not, in my opinion, invalid by reason only that it affects the prerogative of the Crown. The City of Madras Municipal Act is such a law, and even if the fees specified in section 341 thereof are to be regarded as "tolls" to which the prerogative of the Crown would apply in England (a proposition which I think is doubtful), there would be nothing contrary to law in the local Legislature requiring such fees to be paid on Government wood in the same way as on wood, the property of private persons.

If the fees are not to be regarded as "tolls," with a special prerogative exemption in favour of Government, still less can they be regarded as necessarily inapplicable to Government if they are, as I think they are, in reality a mere tax or town duty, similar to the duty imposed by Act I of 1890 (Madras) on all tobacco brought into the City of Madras. It would, no doubt, seem to be the case that in England, owing to historical causes, the Legislature has proceeded on the view that the Crown is not bound by a Statute unless named in it, and we, therefore, find that the Crown is in many Statutes expressly stated to be bound, but it is impossible to say broadly that in India the Crown is not bound by a Statute, or the taxing provisions of a Statute, unless expressly named in it. Such express inclusion is altogether exceptional. It would be more correct to say that, as a general rule, the Indian Legislatures have proceeded on the assumption that the Government

will be bound by the Statute unless expressly or by necessary implication excluded from its operation. Government, when a party to litigation, pays Court-fees just as other suitors do because there is no special exemption in favour of Government in the Court Fees Act. On the other hand, Government is specially exempted from the payment of stamp duties under the General Stamp Act 1899, section 3, proviso 1, "in cases where but for this exemption the Government would be liable to pay the duty chargeable in respect of such instrument" This amounts to a statutory declaration that Government would be liable to pay the duty but for the special exemption. In like manner goods belonging to Government or specially exempted from duty under the Sea Customs Act and the Indian Tariff Act, and it would be easy to enumerate many other Acts in which exemptions are made in favour of Government on the evident assumption that but for such exemption the Government would be bound. Perhaps, however, the most important Act of all is the "Municipal Taxation Act, 1881" passed by the Governor-General in Council. It gives the Governor-General in Council power by an order in writing to prohibit the levy by a Municipal Committee of any specified tax payable by the Secretary of State for India in Council, but provides that in such case "the Secretary of State in Council shall be liable to pay to the Municipal Committee, in lieu of such tax," such sums (if any) as an officer appointed by Government may, in all the circumstances of the case, determine, to be fair and reasonable. The preamble to this Act does not allege that the imposition of a tax payable by the Secretary of State to a Municipal authority is opposed to the prerogative of the Crown. It assumes that such taxation is legal. The Act, in effect, is an acknowledgment by the supreme legislative authority in India that Municipal taxes may be legally and properly payable by the Secretary of State for India in Council. We have not been referred to a single Local or Municipal Act in which Government or the Secretary of State is expressly named as liable to taxation. If such liability did not exist or if it depended, as the Advocate-General contends that it does, on the Government being expressly named in the Statute, this Municipal Taxation Act of 1881 would have had no scope for application and would have been unnecessary. The Legislature has treated such taxation as legal and proper, but has provided a special machinery for its assessment and levy, in

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order to guard against abuses or inconveniences that might arise if the machinery were that provided by the Acts as suitable in the case of private persons. A similar policy is embodied in the Indian Tolls (Army) Act II of 1901, and the Government Buildings Act IV of 1899. It may be noted in passing that in the former Act, octroi or town duties are specially excluded from the definition of "tolls" from the payment of which the Act exempts military persons and certain military property and certain property of His Majesty. It is in my opinion impossible to hold that these Acts and similar exemptions in other Acts were made by the Legislature in ignorance of the prerogative rights of the Crown or merely *ex majore cautela* and without any legal necessity. The whole history and tenor of Indian legislation is opposed to the contention. It may be taken, then, that the local Legislature has power to impose taxation for purposes that make for the peace and good government of the presidency, and that such taxation is not invalid by reason only that it is payable by the Secretary of State for India in Council. The question, then, after all comes to this, whether on the true construction of the City of Madras Municipal Act I of 1884, there is clearly manifest an intention to make section 341 applicable to wood imported by Government, and the intention is to be gathered, according to the ordinary rules of construction, from the general scope and tenor of the Act, and of the legislation *in pari materia* of which it forms a part. I am of opinion that the question must be answered in the affirmative. We find that in the City of Madras Municipal Act (V of 1878), which was in force before the Act of 1884, there were provisions for levying taxes on buildings and lands, on professions and salaries, and on vehicles and animals, and for levying tolls on vehicles and animals entering Municipal limits. Government buildings and lands were not exempted from taxation, though the Madras Harbour Works were exempted, as were also places used for public worship and burial grounds. Besides the general tax on buildings and lands, there were special taxes leviable on buildings and lands as a water rate, and as a lighting rate. In regard to neither was the Government generally exempt, but buildings and land in Fort St. George, which all belong to Government, were exempt from the lighting tax, though not from the water tax. This is notable as showing that the Legislature had in mind the question of exemption of Government buildings

and lands and expressly gave that exemption in part, though not generally. Military officers were not exempt from the tax on salaries, but gun carriages, ordnance carts and waggons, cavalry horses and vehicles and animals belonging to Government, were exempt from the vehicle and animal taxes, and it was provided that no tolls should be paid "for the passage of troops, Government stores, Government vehicles or animals or any other Government property." Government was also exempt from the provisions of the sections which required persons exercising certain dangerous and offensive trades, keeping stables, cart-stands, &c, and places for the storage and sale of wood and other inflammable substances, to take out licenses and pay fees in respect thereof.

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A section (328) corresponding to section 338 of the present City of Madras Municipal Act, existed in the Act of 1878, but it had no section corresponding to section 341. Strong objections, to a great extent sentimental, were taken by military officers to the payment of a profession tax under the Towns Improvement Act which was then in force in the mufassal Municipalities, and this, together with certain abuses which had occurred in regard to the levy of the tax on Government buildings and lands, led the Legislature to pass Act XI of 1881, the Municipal Taxation Act already referred to, by which the Governor-General in Council was empowered to prohibit the levy of any specified Municipal tax payable (1) by Military Officers, (2) by the Secretary of State for India in Council, on certain terms as to compensating the Municipal authorities. It was after this Act was passed that the present City of Madras Municipal Act, 1884, was passed, and in it we find section 341 introduced for the first time. No exemption in favour of Government is made in this section. The effect of this section is to impose an octroi or town duty on timber and firewood brought into the City. Six years later a similar duty was imposed by Act I of 1890 (Madras) on all tobacco brought into the City, and again we find no exemption in favour of Government. Looking to the precise manner in which the Government is exempted from payment of certain taxes and fees and to the absence of any such exemption in the case of other taxes and fees, it seems to me that the clear intention of the Legislature was to give exemption in the cases specified, and not to give exemptions in cases not specified. The omission of any exemption in the case of Town duties appears to be intelligible enough, and to be in accordance

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with the general policy of the Supreme Indian Legislature as indicated by the Municipal Taxation Act, 1881. Under this Act, Government has the power to prohibit the levy of the tax if it sees fit to do so; but to hold that the Legislature when enacting the City of Madras Municipal Act, 1884, did not mean to make section 341 applicable to Government, would, in my judgment, be opposed to the manifest intention of the Act, when construed in its natural sense according to accepted canons of interpretation applicable to Indian Statutes, and with reference to the course of legislation in India and the Acts which have from time to time been passed *in pari materia*.

In this view the conviction was right and the revision petition must be dismissed

BHASHYAM AYYANGAR, J.—The petitioner is the Superintendent of the Gun Carriage Factory at Madras and in his official capacity caused to be brought within the City of Madras on the 7th November 1900 and the 4th February 1901, 21 logs of timber of the aggregate weight of 14½ tons without obtaining a license from the Municipality of Madras, on payment of the fee prescribed by section 341 of Madras Act I of 1884. It is admitted that the timber so brought was the property of Government and was required for the purpose of building gun carriages for His Majesty's forces and that if the same were liable to duty under section 341, such duty will have to be paid out of the Public Indian Revenue.

The petitioner, having been convicted and fined by the Chief Presidency Magistrate for having brought the timber into the City without obtaining a license from the Municipality of Madras, this revision petition has been preferred for the purpose of determining whether the license prescribed by section 341 is necessary in the case of timber brought into the City of Madras by Government. The legality of the conviction of the petitioner is questioned solely on the ground that he was not bound to obtain the license prescribed by section 341, and it is the only question that has been argued. The learned Advocate-General, who appears for the petitioner, bases his contention on three grounds:—

- i. that section 341 is merely ancillary to section 338 and that the exemption in favour of Government in the latter is therefore equally applicable to the former;
- ii. that the exemption from payment of tolls made by section 174 in favour of Government is applicable to

- the license-fee prescribed by section 341, such fee amounting in fact to a toll; and
- iii. that the Crown is not bound by the taxing provision of a Statute unless there be express words to bind it or unless the inference that it was intended to bind the Crown is manifest and irresistible, whereas on the true construction of Madras Act I of 1884 no such intention is anywhere to be found.

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The first two grounds are clearly untenable and present no difficulty. Section 338 enjoins that yearly licenses should be obtained in respect of every place set apart for the sale or storage (for other than private use) of timber or firewood, &c, by the occupier of such place. The fee and the rate of fee for the issue of such licenses are to be fixed by the Commissioners with the sanction of the Governor in Council under section 420, and "the president may, as he in his discretion and under such restrictions and regulations as he thinks fit, grant or refuse such license." The proviso to section 338, exempts from the operation of the section any such place in the occupation or under the control of Government. This section (338) was practically in force since 1867. But section 341 was enacted only in 1884 and is in no sense ancillary to, or dependent upon, section 338. It really imposes octroi duties or town duties on the importation of timber or firewood, the duty being regulated with reference to its weight. The importer is required, on payment of the duty, to obtain a license specifying the place and conditions of storing of the timber or firewood and the President has no discretion to refuse such license. The specification, in the license, of the intended place of storing will enable the Municipal Commissioners to find out if the occupier of such place of storage, if it be not in the occupation or under the control of Government, has obtained the license prescribed by section 338. The primary object of section 341 is the levy of import duty and that is entirely independent of section 338. Incidentally, no doubt, provision is made in section 341 in view to check the evasion of section 338 in cases to which that section is applicable. Timber or firewood imported by Government may or may not be stored in a place in the occupation or under the control of Government. It is impossible to connect section 341 and section 338 in such a way as to justify the

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engrafting on the former, of the exemption in favour of Government contained in the latter

The second ground urged proceeds upon the assumptions that the scope of section 174 is much wider than it really is and that the duty leviable under section 341 can be regarded as a "toll". A reference to section 98, particularly to clause 9, shows that tolls leviable under the Act are only in respect of vehicles and animals entering the Municipal limits. Such tolls are dealt with in sections 170—178 under the heading of "tolls on animals and vehicles entering the Municipal limits" and the rates of tolls and the vehicles and animals in respect of which tolls are leviable are specified in schedule D. A reference to the schedule shows that the rate of tolls varies according as the animals or vehicles are laden or not laden. So far as Government is concerned section 174 exempts Government from payment of tolls for the passage of Government vehicles or animals, Government stores or any other Government property. The exemption can only relate to tolls leviable as such under section 170 of the Act and they are specified in schedule D. I do not advert to the amendment of that section by the Indian Tolls (Army) Act (II of 1901) as the amendment does not affect the question under consideration. The duty leviable under section 341 is not for the passage of timber or firewood, within the meaning of section 174, but for importing the same into the City. The exemption in favour of Government in section 174, can only apply to duties leviable under the Act as "tolls" (section 170) and cannot be extended to section 341 even if the duty prescribed by the latter can be regarded as a "toll" in its general sense. In my opinion the duty imposed by section 341 on timber or firewood imported into the City of Madras is really an octroi-duty and that it is such is made perfectly clear by the amendment of that section by Madras Act II of 1892 providing for drawback upon timber or firewood exported from Madras, in respect of which import duty has been paid.

I do not think that "toll" even in its wide acceptance can comprise such a tax. "Toll" is defined in the 'Century Dictionary' as "a tax paid or duty imposed for some use or privilege or other reasonable consideration" and this definition, I think, brings out best the meaning of the word "toll" from a legal point of view. The learned Advocate-General, relying upon the

definition of "toll" given in Sheppard's 'Abridgment' urges that the term will include octroi-duties or town-duties on the import of goods. That definition is quoted in the argument of Counsel in *Westover v. Perkins*(1) and I am by no means satisfied that an octroi-duty payable by the owner of goods—and not by the buyer as stated in Sheppard's definition—falls within the definition. It seems to me that the definition quoted above from the Century Dictionary succinctly expresses the idea conveyed by the definition in Sheppard's 'Abridgment'. I may here refer to the definition of "tolls" given in the Indian Tolls (Army) Act II of 1901, section 2 (h), which, while more comprehensive than "tolls" referred to as such in Madras Act I of 1884, expressly excludes customs-duties and octroi-duties or town-duties on the import of goods.

The learned Advocate-General bases his contention chiefly on the third ground. The substance of his argument is that the Crown is not bound to pay the duty imposed by section 341 because Government is neither expressly nor by necessary implication included within the purview of that section; and that the express exemption of the Crown from taxes imposed under several other sections of the Act cannot legitimately lead to the necessary implication that the Crown is liable to pay taxes imposed by section 341 and certain other sections in regard to which there is no similar exemption. The question was argued on both sides with reference to certain English and Indian decisions, in some of which it was held, that the Crown was not bound because it was not expressly named, and in others, it was bound though not expressly named. The extent to which decisions in English Courts, passed with reference to Statutes of Parliament and the prerogatives of the Crown under the English Law, will be a safe guide to the interpretation of Acts passed by the Indian Legislature and the prerogatives of the Crown in India, will depend very much upon the policy and course of Indian legislation and the powers of the Indian Legislature—especially of the Provincial Legislatures, whose competence to affect by legislation the prerogatives of the Crown is seriously doubted by Sir Courtenay Ilbert in his recent work on the "Government of India" (at pages 223 and 226)

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(1) 2 E. & E., 57 at pp. 61-62; 28 L.J., (M.C.), 227.

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It is unnecessary to advert to the powers of the Indian Legislature and the course of Indian legislation prior to 3 & 4 William IV (1833), cap. 85, which vested the legislative power of the Indian Government exclusively in the Governor-General in Council. Section 43 of that Act defined the powers of the Indian Legislature as follows :—

“ And be it enacted that the said Governor-General in Council shall have power to make laws and regulations for repealing, amending or altering any laws or regulations whatever, now in force, or hereafter to be in force in the said territories or any part thereof and to make laws and regulations for all persons, whether British or native, foreigners or others and for all Courts of Justice whether established by His Majesty's charters or otherwise and the jurisdictions thereof, and for all places and things whatsoever within and throughout the whole and every part of the said territories and for all servants of the said Company within the dominion of princes and states in alliance with the said Company ; save and except that the said Governor-General in Council shall not have the power of making any laws or regulations which shall in any way repeal, vary, suspend or affect any of the provisions of this Act or any of the provisions of the Acts for punishing mutiny and desertion of Officers and Soldiers whether in the service of His Majesty or of the said Company, or any provisions of any Act hereafter to be passed in any wise affecting the said Company or the said territories or the inhabitants thereof or any laws or regulations which shall in any way affect any prerogative of the Crown, or the authority of Parliament or the constitution or rights of the said Company or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom or the sovereignty or dominion of the said Crown over any part of the said territories ” By section 59 of the same Statute it was provided that the Provincial Governors in Council were no longer to have the power of making laws except in case of urgent necessity and then only until the decision of the Governor-General of India in Council should be signified thereon. It will be noticed that by section 43 the Governor-General in Council was prohibited from making any law affecting the prerogative of the Crown. This provision, however, was modified by 16 & 17 Vict., cap.

95, section 26, which provided as follows:—"No law or regulation made by the Governor-General in Council shall be invalid by reason only that the same affects any prerogative of the Crown, provided such law or regulation shall have received the previous sanction of the Crown signified under the Royal Sign Manual of Her Majesty, countersigned by the President of the Board of Commissioners for the affairs of India."

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When the Indian Councils Act 1861 (24 & 25 Vict., cap. 67), was passed, section 43 of 3 & 4 William IV, cap. 85 and section 26 of 16 & 17 Vict., cap. 95, were, among others, repealed and the legislative powers of the Provincial Governors in Council were restored. Section 23 of the Indian Councils Act defines the legislative powers of the Governor-General in Council and it substantially corresponds to section 43 of 3 & 4 William IV, cap. 85, except in one important particular, *ie.*, that the prerogative of the Crown is not excepted from the legislative authority of the Governor-General in Council save, of course, in so far as the matters specially excepted may comprise certain prerogatives of the Crown. Section 24 expressly provides that a law made by the Governor-General in Council shall not be deemed invalid by reason only that it affects the prerogatives of the Crown. This is simply a reproduction of the first part of section 26 of 16 & 17 Vict., cap. 95, which section was repealed. This section is really superfluous and can be regarded as inserted only '*ex majore cautela*,' as an important change was made in the law by subjecting the prerogative of the Crown to the legislative authority of the Governor-General in Council, except in so far as such prerogative may relate to the allegiance of any person to the Crown or to the sovereignty or dominion of the Crown over any part of the Indian territories—which are specially excepted by the concluding paragraph of section 22. Section 42 empowers the Provincial Governors in Council to make laws and regulations "for the peace and good government" of the provinces, subject to the condition that no Act of Parliament then in force or thereafter to be in force in the provinces is to be affected by any provincial legislation. It will be noted that the matters which may be dealt with by the provincial Legislatures are not specifically enumerated as in the case of the Governor-General in Council, nor are the matters comprised in the last paragraph of section 22, which are excepted from the legislative authority of the

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Governor-General in Council, specially excepted in section 42 from that of the Provincial Governors in Council. It seems probable that it was considered unnecessary that the exceptions covered by the last paragraph of section 22, should be engrafted on section 42 inasmuch as section 42 empowers Provincial Governors in Council to make laws only for the "peace and good government" of the province, and that such power cannot possibly extend to any of the matters comprised in the last paragraph of section 22. Whether this is so or not, it is obvious that matters excepted from the legislative authority of the Governor-General in Council cannot be within the powers of subordinate provincial Legislatures. It is true, as pointed out by Sir C Ilbert, that there is no section, with respect to the laws passed by provincial Legislatures corresponding to section 24 which relates only to laws passed by the Governor-General in Council affecting the prerogative of the Crown. Does this warrant the inference drawn by Sir Courtenay Ilbert that the provincial Legislatures do not possess the power which the Governor-General in Council has, of making laws which may affect the prerogative of the Crown? If the power of the Governor-General in Council to pass such a law was conferred by section 24, no doubt the inference would be irresistible, that in the absence of such a section the provincial Legislature can pass no such law. The power of the Governor-General in Council to pass a law affecting the prerogative of the Crown is derived not from section 24 but from section 22 which, unlike the corresponding section 43 of 3 & 1 William IV, cap. 85, does not except the prerogative of the Crown generally from the legislative jurisdiction of the Governor-General in Council. Section 42 defining the powers of the provincial Legislatures does not except the prerogative of the Crown generally from their jurisdiction and it can hardly be contended that there would be no need or occasion to affect any prerogative of the Crown in making effective laws and regulations for the "peace and good government" of the province.

The phrase "peace, order and good government" is used in several Acts of Parliament conferring legislative powers on Colonial assemblies. The 91st section of the British North America Act, 1867, provides that it shall be lawful for the Queen, with the advice and consent of the Senate and the House of Commons, to make laws for the "peace, order and good government" of Canada, in relation to all matters not coming within the class of subjects

by this Act assigned exclusively to the Legislatures of the provinces In *Russell v The Queen*(1) a question was raised as to the validity of the Canada Temperance Act, 1878, passed by the Dominion Parliament and it was held by the Privy Council that the Act did not come within one of the classes of subjects assigned to the provincial Legislatures and was *intra vires* of the Dominion Parliament, being of a nature which fell within the general authority of Parliament to make laws for the order and good government of Canada In *Ashbury v Ellis*(2) a contention was raised that the Act of Parliament, 15 & 16 Vict., cap. 72, which gave to the Legislature of New Zealand power "to make laws for the peace, order and good government of New Zealand provided that no such law be repugnant to the laws of England" did not give power to subject to its judicial tribunals persons who neither by themselves nor by their agent were present in the colony It was argued that though the law was not repugnant to the laws of England, yet the moment an attempt was made by the Legislature of New Zealand to affect persons out of New Zealand, that moment the local limitations of the jurisdiction were exceeded and the attempt was nugatory Their Lordships of the Privy Council overruled the objection, it being in their opinion "clear that it is for the peace, order and good government of New Zealand that the Courts in New Zealand should in any case of contracts made or to be performed in New Zealand have the power of judging whether they will or will not proceed in the absence of the defendant" and that whether a foreign Court will or will not enforce a judgment passed in the absence of the defendant under such circumstances, it is sufficient for trying "the validity of New Zealand laws in New Zealand to say that the peace, order and good government of New Zealand are promoted by the enforcement of the decrees of their own Courts in New Zealand" Though no question of prerogative being affected by the colonial Legislature was involved in either of the above cases, they afford illustrations of the liberal interpretation which has been placed by the Judicial Committee of the Privy Council on the expression "peace, order and good government."

In *Cushing v. Dupuy* (3) the question arose as to whether the Dominion Enactment, 40 Vict., cap 41, section 28, amending the

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(1) L R, 7 App Cas, 829.

(2) [1893] A C, 339

(3) L. R, 5 App Cas, 409.

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Canadian Insolvency Act and providing that the judgment of the Court of Appeal in matters of insolvency should be "final" could and did derogate from the prerogative of the Crown to allow appeals as an act of grace. Their Lordships of the Privy Council thought it unnecessary to consider and decide whether the Parliament of Canada had power to interfere, by legislation, with the royal prerogative, as in their opinion the 28th section of the Insolvency Act did not profess to touch it and that upon the general principle that the rights of the Crown can be taken away only by express words, the power of the Queen to allow appeals as an act of grace was not affected by the enactment. The attention of the Privy Council was drawn to an Act of the Parliament of Canada, 31 Vict, cap. 1, enacting rules of interpretation to be applied to all future legislation, when not inconsistent with the Act or the context, which, among others, provides that no provision or enactment in any act shall affect in any manner or way whatsoever, the rights of Her Majesty, her heirs, or successors, unless it is expressly stated therein that Her Majesty shall be bound thereby.

An earlier decision of the Privy Council, to the contrary in *Cuwiller v. Aylwin*(1) which was followed in *The Queen v. Eduljee Byramjee*(2) and in *The Queen v. Alloo Paroo*(3) was virtually, if not expressly, overruled on the ground that the decision in that case "if not expressly overruled has not been followed and later decisions are opposed to it" A similar question arose before the Privy Council in 1856 in an appeal from the Sadr Dewani Adalat of Bombay, in *Modee Kulkhoosrow Hormusjee v. Cooverbhaee*(4) as to the operation of Act III of 1843 in barring the prerogative of the Crown from admitting appeals against an order rejecting a special appeal to the Sadr Dewani Adalat which order was declared "final" by that Act Their Lordships of the Privy Council held that the Act would have no such operation as the Indian Legislature had no power to limit or affect the prerogative of the Crown without its previous sanction and it did not appear that the said Act was passed after obtaining such sanction. It was for the same reason that Act VI of 1856 (an Act for granting exclusive privileges to Inventors), passed by the Legislative Council of India, was disallowed by the Court of Directors on the advice of Her

(1) 2 Knapp's P.C., 72

(3) 3 M.I.A., 488 at p 496

(2) 3 M.I.A., 468 at p. 486.

(4) 6 M.I.A., 448 at p 455.

Majesty's law officers (*vide* Preamble to Act XV of 1859) that the exclusive privilege of the Crown to grant patents for inventions was affected by the Act. The Act VI of 1856 was accordingly repealed by Act IX of 1857, but was virtually re-enacted as Act XV of 1859, after having obtained previously the sanction of Her Majesty as required by section 26 of 16 & 17, Vict, cap 95.

The Indian Councils Act, however, removed such limitation of the powers of the Indian Legislature. In that Act itself there is internal evidence that there is no such limitation even in respect of the powers of the provincial Legislatures, for section 43 contemplates provincial legislation, with the previous sanction of the Governor-General, for regulating coins and patents or affecting the relations of Government with foreign princes or states. A reference to sections 19 and 38 will show that both in the Governor-General's Council and in the Provincial Councils, bills may be introduced, with the previous sanction of the Governor-General or Governor as the case may be, affecting the public revenue of India or imposing any charge on such revenue. I draw attention to this special provision in connection with certain English decisions to be referred to hereafter in which it was held that although there is no special exemption of the King, yet he is exempted by virtue of his prerogative from the operation of every Act imposing a duty or a tax

It has now been definitively decided by the Judicial Committee of the Privy Council in more cases than one, both from India and the Colonies, that an Indian or Colonial Legislature is not a delegate of the Imperial Legislature, that it is restricted in the area of its powers, but within that area it is unrestricted. In *The Queen v. Burah*(1) their Lordships of the Privy Council, in overruling a Full Bench decision of the Calcutta High Court, that section 9 of Act XXIII of 1869 was *ultra vires* of the Indian Legislature, laid down the general law in these terms :—"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it and it can of course do nothing beyond the limits which circumscribe those powers. But when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has and was intended to have plenary powers of legislation, as large and of the same nature as those of

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(1) L.R., 3 App. Cas., 889.

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Parliament itself." The same doctrine was laid down in a later case, *Hodge v. The Queen*(1) by their Lordships of the Privy Council in the following terms—"It appears to their Lordships, however, that the objection thus raised by the appellant is founded on an entire misapprehension of the true character and position of provincial Legislatures. They are in no sense delegates of, or acting under mandates from, the Imperial Parliament. When the British North America Act enacted that there should be a Legislature for Ontario and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes, in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agent of, the Imperial Parliament, but authority, as plenary and as ample, within the limits prescribed by section 92, as the Imperial Parliament in the plenitude of its power possessed or could bestow. Within these limits of subjects and area, the local Legislature is supreme and has the same authority as the Imperial Parliament." This principle was approved of and followed in an appeal from New South Wales in *Powell v. Apollo Candle Company*(2) The same doctrine virtually finds legislative declaration in section 45 of 3 & 4 William IV, cap 85.

In my opinion, therefore, there can be no reasonable doubt as to the competence of provincial Legislatures to pass laws within the area of their powers—which is narrower than the area of the powers of the Governor-General in Council—though such laws may affect the prerogative of the Crown. If it were otherwise, the powers of the provincial Legislature to make laws for the peace, order and good government of the province would be unduly hampered. There is no small degree of uncertainty as to the extent of the prerogatives of the Crown in India and the validity of no few enactments of the provincial Legislature will be called into question in Courts on the ground that they directly or indirectly affect the royal prerogative.

But in construing the general words of an enactment it may be important to consider whether any prerogative of the Crown will be affected by a literal construction; and for the purposes of this case, it will be necessary to consider whether exemption from statutory duties and taxes is, in the real sense of the expression,

(1) L.R., 9 App Cas., 117.

(2) L.R., 10 App Cas., 282

a "Crown prerogative." In the *Mayor of Lyons v East India Company*(1) the principle of law bearing upon the prerogatives of the Crown in India was indicated by Lord Brougham in the following terms—"It is agreed on all hands that a foreign settlement obtained in an inhabited country by conquest or by cession from another power stands on a different relation to the present question from a settlement made by colonising, *i.e.*, peopling an uninhabited country. In the latter case, it is said that the subjects of the Crown carry with them the laws of England, there being of course no *lex loci*. In the former case, it is allowed that the law of the country continues until the Crown or the Legislature changes it. (*Vide also Cooper v Stuart*(2),

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. Then, is Calcutta to be considered as an uninhabited district settled by English subjects or as an inhabited district obtained by conquest or cession? If it falls within the latter description, has the English law incapacitating aliens ever been introduced? If that law has never been introduced, has there been such an introduction of English law generally that those parts which have been introduced draw along with them the law touching aliens? An answer to these three questions will include a consideration of the only reason for the proposition upon which the judgment below is mainly rested, *viz.*, that the royal prerogative extends necessarily and immediately to all acquisitions however made and that the forfeiture of aliens' real estate is parcel of that prerogative." In considering these three questions, the Lordships after adverting to the contention that there is something in the law incapacitating aliens, which makes it, so to speak, of necessary application wheresoever the sovereignty of the Crown is established, as if it were inherent in the nature of the sovereign power, and pointing out with reference to the laws of various countries, that there is no warrant in the nature of the thing, for the position that this right is an incident of sovereignty, observe as follows:—"Besides, if reference be made to the prerogative of the English Crown, that prerogative in other particulars is of as high a nature, being given for the same purpose of protecting the State, and it is not contended that those branches are extended to Bengal. Mines of precious metals, treasure-trove, royal fish are all vested in the

(1) 1 M.I.A., 175.

(2) L.R., 14 App. Cas., 286 at p. 291.

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Crown for the purpose of maintaining its power and enabling it to defend the State. They are not enjoyed by the sovereign in all or even in most countries and no one has said that they extend to the East Indian possessions of the British Crown." In the *Advocate-General of Bengal v Runee Surnomoye Dossee*(1) Lord Kingsdown, after adverting to the introduction and establishment of the English Criminal Law in India and its application to Natives as well as Europeans with reference to the prerogatives of the Crown (pages 428—30), to forfeiture of the personal property of persons committing suicide in Calcutta, arrived at the conclusion that the English Law of '*felo de se*' and forfeiture of goods and chattels did not extend to a native Hindu, though a British subject, committing suicide at Calcutta. It is unnecessary to refer to various other instances which will readily occur to one's mind, which according to the Common Law of England are comprised in the royal prerogative, but in the very nature of things are either inapplicable to or have not been introduced into India. On the other hand, it is probably true that the Crown has, according to the Common Law of India, certain prerogatives which it may exercise in India though not in England, notably the prerogative of imposing by an executive act assessment on lands and varying the same from time to time. The prerogatives of the Crown in India—a country in which the title of the British Crown is of a very mixed character—may vary in different provinces, as also in the Presidency towns as distinguished from the mufassal. The determination, with anything like legal precision, of all the prerogatives of the British Crown in India is by no means an easy task.

I shall now proceed to consider how far the canon of interpretation commonly stated in the form that "the Crown is not bound by a Statute unless named in it" can be safely applied to Acts of the Indian Legislature and in particular to taxing Acts. The various cases in the English reports, in which this canon of interpretation was considered and in some of which it was held that the Crown was not bound because it was not expressly named or included by necessary implication, and others in which the Crown was held bound though not so named or included will be found collected in Maxwell's '*Interpretation of Statutes*' (3rd edition), pages 186—193, and Hardcastle's '*Construction of Statutory Law*' (2nd edition),

(1) 9 M.I.A., 391 at pp. 428—30.

pages 401—421. It may not be easy to reconcile all the cases or to deduce therefrom certain definite rules of interpretation. The leading canon seems to be that laid down by Lord Coke in the *Magdalene College case*(1), which the Master of the Rolls states as follows in *Ex parte Postmaster-General*(2):—"Where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the King shall be bound by such Act though not particularly named therein; but where a Statute is general and any prerogative, right, title or interest is thereby divested or taken from the King, in such case the King shall not be bound unless the Statute is made by express terms to extend to him." The Master of the Rolls after observing that that is the general rule and that the point came before the Court of Exchequer in *Attorney-General v. Donaldson*(3) and there Baron Alderson, in delivering the judgment of the Court, said:—"It is a well-established rule, generally speaking, in the construction of Acts of Parliament that the King is not included unless there be words to that effect," held that although the Crown was named in some of the sections of the Bankruptcy Act, 1869, it was not bound by the other provisions of the Act so as to deprive it of its undoubted prerogative of "Extent." This is one of the cases which the learned Advocate-General relies upon. A reference to the judgment of the Master of the Rolls will show that the decision is based not only upon the general canon of interpretation, but also upon the positive conclusion he arrived at from the wording of the sections that the Legislature intended not to deprive the Crown of its undoubted prerogative.

Adverting to the first portion of Lord Coke's rule, Maxwell (at page 193) points out that it would probably be more accurate to say that the Crown is not excluded from the operation of a Statute where neither its prerogative rights nor property are in question. As regards the latter portion of the rule, judicial decisions have clearly established that the Crown is sufficiently named in a Statute, within the meaning of the rule, when the intention of the Legislature to include it is clear and manifest. The canon of interpretation simply amounts to this, that it is to be presumed that the Legislature does not intend to deprive the Crown of any prerogative right, or property unless it expresses its intention to

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(1) 11 Coke's Rep., 74 b.

(2) L.R., 10 Ch. D., 595 at p. 601.

(3) 10 M. & W., 117; 11 L.J., (Ex.), 838.

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do so in explicit terms or makes the inference irresistible. Such a rule of interpretation is not peculiar to the Crown. It is analogous to and founded upon the principle on which, for instance, the following canons of interpretation are equally applicable to the construction of Statutes—viz : (i), it is a sound rule to construe a Statute in conformity with the Common Law rather than against it, except where and so far as the Statute is plainly intended to alter the course of the Common Law (*The Queen v. Morris*(1)); (ii). it is a maxim that a Statute made in the affirmative, without any negative expressed or implied does not take away the Common Law (Coke); (iii), "where there are general words in a later Act capable of reasonable and sensible application, without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier legislation indirectly repealed, altered or derogated from merely by force of such general words without any indication of a particular intention to do so"—*'generalia specialibus non derogant'* (*Saunder v. "Tera Cruz"*(2)); (iv). the general rule undoubtedly is that the jurisdiction of Superior Courts is not taken away except by express words or necessary implication (*Albon v. Pyke*(3)), etc. Those compendious canon of interpretation which are in the nature of maxims can only be regarded as mere guides to the interpretation of Statutes and ought not to be applied as if they were statutory clauses, enacted with all the precision and provisos of an Interpretation Act.

In *Theberge v. Laundry*(4) the Lord Chancellor in an appeal from the Superior Court of Quebec in Canada, while holding in that particular case that the Crown had not the prerogative of admitting an appeal from a judgment of the Superior Court under the "Quebec Controverted Elections Act, 1875," affirmed the general principle of construction in the following words:—"Their Lordships wish to state distinctly that they do not imply any doubt whatever as to the general principle that the prerogative of the Crown cannot be taken away except by express words; and that they would be prepared to uphold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shown to take away that prerogative."

(1) L.R., 1 O.C.R., 90 at p. 95

(3) 4 M. & Gr., 421 at p. 424.

(2) L.R., 10 App. Cas., 59 at p. 68.

(4) L.R., 2 App. Cas., 102.

This emphatic statement of the rule being founded upon general principles of construction is undoubtedly applicable as much to Indian enactments as to Colonial or Imperial Statutes; and if general words of an Indian enactment are such as according to their literal interpretation would divest the Crown of, or take away from it, any prerogative, right, title or interest, they would certainly have to be construed in a limited sense so as not to produce such a result which, it may be reasonable to infer, could not have been in the contemplation of the Legislature, in the absence of a clear indication of an intention to the contrary. But it is unduly stretching the language of the rule, to bring within its scope general words of a Statute imposing a tax and claim exemption for the Crown on the ground that the Crown is divested of any prerogative, right, title or interest, by giving full effect to the general words

So far as exemption from any tax imposed by a Statute is concerned, the question for determination is whether according to the right construction of the Statute, the Crown is or is not made liable to pay the tax. In the former case, it is bound to pay; in the latter, it is not; in neither case is there any question of prerogative. The rule of construction above adverted to cannot itself be regarded as a prerogative of the Crown. A Statute imposing a tax upon Crown property, which tax will be payable out of the public revenue, cannot reasonably be regarded as divesting the Crown of any right, title or interest, within the meaning of the above rules—especially when such tax is levied for purposes connected with the good government of the country, for which purpose, such revenues are, in India vested in trust in the Crown, by section 29 of 21 & 22 Viet., cap. 106.

In the English reports, the above canon of interpretation has often been referred to, as in *Attorney-General v. Donaldson*(1), as a well-established rule, according to which, generally speaking, the Crown is not included in a Statute unless there be words to that effect; and the exemption of the Crown from payment of rates imposed by Statutes is referred to as an implied prerogative right of the Crown. The state of the English law on this question was fully reviewed and considered by the House of Lords in *Coomber v. Justices of Berks*(2). I cannot do better than

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(1) 10 M & W, 117, 11 L J, (Ex.), 338 (2) L R, 9 App Cas, 61 at pp. 65-66.

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quote the following extracts from the judgments of Lords Blackburn, Watson and Bramwell in that case Lord Blackburn (pages 65-66):—"In *The King v. Cook*(1) the general principle as to the construction of Statutes imposing charges as containing an exemption of the Crown was laid down. That was a case raising the question whether the duty on post-horses was exigible in respect of post-horses carrying an express from the Governor of Portsmouth to one of His Majesty's Principal Secretaries of State, which was not on any private business whatever, but wholly related to the public concerns of this kingdom. It was held that it was not exigible. Lord Kenyon, delivering the judgment of the Court, says 'Now, although there is no special exemption of the King in this Act of Parliament (25 Geo. 3, cap. 51) yet I am of opinion that he is exempted by virtue of his prerogative in the same manner as he is virtually exempted from the 43rd Eliz and every other Act imposing a duty or tax on the subjects.' There may well be expressions in an Act imposing a duty or tax on the subjects, such as to show that the intention of the Legislature was to impose the duty on some property belonging to the Crown. But I do not think it made out that there is any such intention shown in the Income-tax Act. Reliance was placed in the argument on the general words of the rule 'which rule shall be construed to extend to all lands, tenements and hereditaments or heritages capable of actual occupation of whatever nature and for whatever purpose occupied or enjoyed.' But I do not think this can be construed as taking away the exemption, by virtue of the prerogative, of property actually occupied or enjoyed by the Crown I should rather infer that those who framed the Act thought that unless expressly named, such an occupation would have been exempted There had been a considerable number of decisions on the poor-rate, which laid down a much wider principle than that laid down in *The King v. Cook*(1), namely, that whenever property was occupied for 'public purposes' it was exempted from poor-rate. In the *Mersey Docks v. Cameron*(2) it was decided by this House that the exemption to such an extent could not be supported. But, whilst this was decided, it was not said that all the cases which established exemptions on the ground indicated in *The King v. Cook*(1) were wrong.

(1) 3 T.R., 519.

(2) 11 H.L.C., 443 at p. 508; 35 L.J., (M.C.), 1.

The passage at pages 464, 465, in the opinion of the majority of the Judges, which I delivered and which has been so often quoted, shows that those who joined in that opinion thought that many of them, such as those deciding that buildings occupied by the Post Office, the Horse Guards, or the Admiralty, were exempt, were obviously right and that those which decided that buildings occupied for Police and for the Assize Courts were exempt, though not so obviously right, were capable of being supported on a ground that did not touch the case then before the House. I do not think that opinion can be properly cited as an authority that those cases were rightly decided, but certainly their authority was not weakened by anything said in that opinion. The House, in *Mersey Docks v. Cameron*(1), did not decide that those cases to which I have referred were rightly decided; but the language of the Lord Chancellor (Lord Westbury) at page 505, seems to me to add to their authority. He there says, that the 'public purposes' to make an exemption 'must be such as are required and created by the government of the country and are therefore to be deemed part of the use and service of the Crown'; and in *Greig v. University of Edinburgh*(2), he more clearly shows what was his view by using this language, 'property occupied by servants of the Crown, and (according to the theory of the Constitution) property occupied for the purposes of the administration of the government of the country, became exempt from liability to the poor-rate.' Lord Cranworth (*Mersey Docks v. Cameron*(1)) by using the words 'more or less sound,' seems to me to guard against being supposed to decide that those cases which proceeded on this ground were all right in deciding that the purposes were those of the public government, to such an extent as to bring them within the principle of *The King v. Cook*(3), but he certainly does not at all impeach them. The Scotch cases on the Scotch poor law proceed on a similar ground. It has been pointed out that in the Scottish poor law, half the poor-rate is imposed on the owner in respect of property, and so far the case is more closely analogous to that of the income-tax; but, I think, that whether the rate is exigible in respect of property, or in respect of occupation, the ground of exemption must be the same, viz., as said by the

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(1) 11 H.L.C., 443 at p. 508; 35 L.J., (M.C.), 1.

(2) L.R., 1 H.L., (Sc.), 350 at p. 354.

(3) 3 T.R., 519.

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Lord Chancellor (Cairns) in *Greig v. University of Edinburgh*(1), the Crown not being named in the English or Scotch Statutes on the subject of assessment, and not being bound by Statute when not expressly named, any property which is in the occupation of the Crown or of persons using it exclusively in or for the service of the Crown is not rateable to the relief of the 'poor' (pages 67—69) I do not say that the Assize Courts, maintained by the county for the administration of the Queen's justice in the Queen's Courts, are quite so clearly occupied by the servants of the Crown, as those Courts which are maintained by the Woods and Forests out of the general revenue of the country. Nor do I say that the Police Station maintained by the county for the maintenance of the police is quite so clearly occupied by the servants of the Crown as a barrack maintained for soldiers, and paid for out of the general revenues of the country. But I think there is great reason for saying that both are maintained for the purposes of the administration, or those purposes of the Government which are, according to the theory of the Constitution, administered by the Sovereign. If it was a new point whether buildings occupied for the purpose of County Courts and County Police were liable to be rated for the poor-rate, I think there would be considerable force in the argument that the county occupying property in order to fulfil a duty to the Crown which it is required to fulfil at its own expense, is not occupying it for the Government, or in the service of the Government. But as for many years property thus occupied has been uniformly held exempt from the poor-rate, I do not think your Lordships ought now to hold that it is liable to poor-rate (pages 69—70) It seems to me that it is not material whether the assessment statute imposing any tax, does so, like the Poor-rate Acts, for a local purpose, or like the Statute imposing a duty on post-horses, considered in *The King v. Cook*(2), or the income-tax, for an imperial purpose. In each there is an implied exemption on the ground of prerogative. And if the property is so held as to bring it within the ground of exemption for the one Statute, it must surely be brought within the ground of exemption for the other (page 71) Lord Watson.—It was accordingly argued for the appellant that your Lordships are free in this case to consider all questions as to the proper extent and

(1) 11 R., 1 H.L., (Sc.), 350 at p. 351

(2) 3 T.R., 519.

limit of Crown privilege, as if these had now arisen for the first time for decision. The statement in point of fact upon which that argument was rested is not strictly accurate, because as has been pointed out by my noble and learned friend, the Court in *The King v Cook* (1) gave effect to the privilege of the Crown not in the case of a local but of a general tax, holding that such privilege extended not only to the Act of Elizabeth, but to every Act imposing a tax upon the subjects of the Crown. But I should have been prepared to hold, apart from the authority of that case, that the appellant's contestation upon this point is untenable. The exemption of the Crown from the incidence of rating Statutes is a general privilege and is nowise dependent upon the local or imperial character of the rate. It takes effect in all cases, when the Crown is not named in the Statute, or I should prefer to say, in all cases where the enactments do not take away the privilege, either in express terms or by plain and necessary implication. There is not, in my opinion, one kind of Crown exemption from the Statute of Elizabeth and another kind of Crown exemption from the Income Tax Acts, (page 76)

Lord Bramwell.—The poor-rate is local. Whatever exempts part of the property in a rated locality, adds to the burden on the rest, and there is this additional hardship, that the exempted part may increase the burden itself by adding to the numbers chargeable on the rate. Moreover, the reasoning on which that exemption was founded may be doubtful. But it is the law; the law as confirmed in this House by the reasoning in the *Mersey Docks case* (2). For, as I have said, there is some hardship in exempting any property from a local rate, there is none in exempting from a general tax a class of property everywhere within the range of that tax. The payers and receivers of the poor-rate are not the same. If the Crown paid income-tax, it would be at once payer and receiver. And indeed in one view the question is unimportant. For if this kind of property pays everywhere, a less rate of income-tax will be necessary and a greater local rate everywhere. Whereas by our decision more income-tax may be required and less local rate. And this is what many people think desirable (pages 79-80)."

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(1) 3 T.R., 519.

(2) 11 H.L.C., 113, 35 L.J., (M.C.), 1.

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It is clear from the above extracts that unless the Crown is included expressly or by necessary implication, Crown property is not liable in England to any rates or taxes. Adverting to Lord Bramwell's adverse criticism of the course of decisions as to Crown exemptions, I may mention that it is stated in Castle's Law of Rating (2nd edition, 1886) at page 121, that, "within the last few years attempts have been made in Parliament to carry through an Act which will remove the exemption from rateability of Government property." Lords Kenyon and Blackburn refer to the exemption of the Crown, as an implied exemption by virtue or on the ground of prerogative. It may be inferred from the observation made by Lord Blackburn that framers of English Statutes generally proceed on the principle that unless the Crown be expressly included it will not be bound by the Statute, and whenever it is intended to bind the Crown, it is expressly named, *e.g.*, The Arbitration Act, 1889, section 23; The Patents, etc., Act, 1883, section 27; The Bankruptcy Act, 1883, section 150; The Interpretation Act, 1889, section 30; The Stamp Act, 1891, section 119.

The reference by Lords Kenyon and Blackburn to the prerogative of the Crown as the reason for its implied exemption must be understood as referring only to the above rule of interpretation and not to any prerogative of the Crown in its real sense. Similarly the privilege of the Crown to use an invention without compensation to the patentee, notwithstanding the grant of a patent for the exclusive right to the use of the invention and the implied exemption of the Crown from payment of tolls, notwithstanding a grant, by itself, of a right to levy tolls, are referred to as prerogatives of the Crown, though such privilege and exemption are only the result of the rule applicable to the interpretation of Crown-grants, the grant in either case being made in the exercise of one and the same branch of the royal prerogative (*Feather v. The Queen*(1)).

In the *Mayor, &c., of Weymouth v. Nugent*(2) on which the learned Advocate-General specially relies, Cockburn, C.J., explained as follows the immunity enjoyed by the Crown from payment of tolls:—"It may be said that the doctrine of the immunity enjoyed by the Crown from payment of tolls arose in

(1) 35 L.J., (Q.B.), 200.

(2) 34 L.J., (M.C.), 81; 6 B. & S., 22.

times when tolls were levied by virtue of a grant from the Crown or under prescription which presumed a prior grant from the Crown, and therefore it might well be assumed that where tolls were granted by the Crown, it was not intended by the Crown that it should itself be barred by the grant; but whether that be the origin of the immunity or not, it has obtained from the earliest times, and it cannot be supposed that the Legislature could have intended to make the Crown liable to the payment of those duties, without making any mention of the Crown at all." Both on the ground of the exemption of the Crown from payment of tolls and on the ground that the Crown is not bound by an Act of Parliament unless it is expressly named therein, it was held in that case, that the Crown was not bound to pay wharfage duties under 6 Geo. 4, cap. 116, for stones which were brought by a barge into the harbour for the purpose of being used on Government works which were being carried on there. The Chief Justice refers to both these grounds, as being based upon "two great rules which, from an early period of our history, have obtained as to the royal prerogative." The decision was arrived at notwithstanding that there were only certain specified exemptions in the Statute in favour of the Crown, from which it was argued that it was to be inferred that it was intended by the Legislature, that there should be no other exemptions. This argument did not prevail, the Chief Justice holding that such exemptions were inserted '*ex majore cautela*' and were intended to meet cases, which, it was thought, would most likely arise.

This decision follows the principle laid down in the earlier case of *Westover v. Perkins*(1) which is also relied upon by the learned Advocate-General and in which Lord Campbell said:—"From time immemorial the Sovereign has been exempt from toll and where tolls are enforced by Statute there is an implied exemption of the Sovereign's property." In the case of *Smithett v. Blythe*(2) also cited in support of the petition, the question turned upon 3 Geo 2, cap. 36, which confirmed a patent formerly granted by the Crown for taking tolls in respect of a light-house. There was a proviso that nothing in the Act should extend to charge the King's ships-of-war with the duties granted by the Act or patent. At the time of the passing of the Statute, the post office packets in respect

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(1) 2 E. & E., 57, 28 L.J., (M.C.), 227.

(2) 1 B. & Ad., 509.

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of which toll was claimed from the Crown were not ships owned by the Crown. It was held, that the exemption of His Majesty's ships-of-war did not by implication, render post office packets, which some years after the passing of the Act became the property of the Crown, chargeable with toll.

These three cases proceed on one and the same principle and they relate to the implied exemption of the Crown from payment of tolls; in each of them it was held that such implication was not negatived by the mere fact that certain exemptions in favour of the Crown were expressly made none of which covered the exemption claimed.

It is unnecessary to refer specially to the *Mersey Docks* case(1) which is the leading authority on the implied exemption, from rates and taxes, of Crown property occupied by or on behalf of the Crown for purposes connected with any department of the Government, as that decision has been followed and fully explained in the later decision of the House of Lords in *Coomber v Justices of Berks*(2), already referred to and quoted from.

The cases of *Perry v Eames*(3) and *Wheaton v. Maple & Co.*(4) which are also referred to, are not very much in point. Those cases turned upon sections 2 and 3 of the Prescription Act (2 & 3 William IV, cap. 71). It was held that the former section in which the Crown is specially named did not apply to an easement of light which is specially and exclusively governed by section 3, in which the Crown is omitted, notwithstanding that the Crown is expressly mentioned in sections 1 and 2, and that therefore no easement of light against the Crown can be acquired by prescription under section 3.

I shall now proceed to refer to certain Indian decisions, which have a bearing upon the question under consideration. In *Secretary of State for India v. Bombay Landing & Shipping Co* (5), Westropp, C.J., after a full investigation of the various systems of law, including the Hindu and the Muhammadan laws, as to the prerogative priority of Crown-debts, held that a judgment debt due to the Crown was in Bombay entitled to the same precedence in execution as a like judgment debt in England, if there were no

(1) 11 H.L.C., 443 at p. 508, 35 L.J., (M.C.), 1.

(2) L.R., 9 App. Cas., 61

(3) [1891] 3 Ch., 48.

(4) [1891] 1 Ch., 658.

(5) 5 Bom. H.C.R., (O.C.J.), 23.

special legislative provision affecting that right in the particular case. In answer to the argument that section 183 of the Indian Companies Act (X of 1866) was such special legislative provision, he held that as the Crown was not either expressly or by implication bound by section 183, the prerogative of the Crown was not affected. In the soundness of this decision, on both the points I fully concur. In this case the general words of section 183 would, if literally construed, divest the Crown of one of its prerogatives and it was rightly held that the section cannot be so construed, as it did not appear either in express terms or by implication that it was intended by the Legislature that the section should have such effect.

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In *Ganpat Putaya v. The Collector of Kanara*(1) the question raised was whether the Crown has the first claim to the proceeds of a pauper suit, to the extent of the amount of Court fee that would have been payable at the institution of the suit had the plaintiff not been a pauper. It was held that the Crown had such priority by reason of its prerogative and that section 309 of the Code of Civil Procedure (VIII of 1859) which enables Government to recover the same in the same manner as costs of suit are recoverable, does not divest the Crown of its prerogative. This provision simply enables the Government to recover the debt due to it on account of Court fees which forms an item of costs in the suit, by mere process of execution, instead of by a separate suit and it cannot, therefore, be construed as taking away by implication the priority which the claim of the Crown has by virtue of its prerogative. West J., states the canon of construction applicable to such a case as follows :—" It is a universal rule that prerogative and the advantages it affords cannot be taken away except by consent of the Crown embodied in a Statute. This rule of interpretation is well established and applies not only to the Statutes passed by the British, but also to the Acts of the Indian Legislature framed with constant reference to the rules in England. And the rule as applied to the present case is not an unreasonable one." This decision was approved of and followed by the High Court of Allahabad in *Collector of Moradabad v. Muhamad Daimkhan*(2). I may here refer to section 212 of the Indian Companies Act, 1882, which corresponds to and substantially reproduces section

(1) I.L.R., 1 Bom., 7.

(2) I.L.R., 2 All., 196.

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183 of the Act of 1866, with a proviso that nothing in that section applies to proceedings by Government and also to section 411 of the present Code of Civil Procedure (XIV of 1882) which corresponds to section 309 of Act VIII of 1859 with an additional clause that the amount due to Government shall be a first charge on the subject-matter of the suit. These additions simply give legislative sanction to the above decisions and have been made only '*ex majore cautela*.'

In *Ramachandra v. Pichai Kannu*(1) the question arose whether arrears of rent due by an Abkari renter—which are not charged upon his land—take precedence of a hypothecation debt due by the renter. It was decided and in my opinion rightly, that it had no priority over a mortgage debt. But with all respect to the learned Judges who decided the case, I see no reason to doubt the decisions of the Bombay and Allahabad High Courts in the above two cases.

I shall now turn to a few more Indian decisions which bear on the question of the law of limitation and prescription as affecting the Crown. In *The Secretary of State for India v. Mathurabhai*(2) the Chief Justice, following the rule of interpretation of Statutes applicable to the Crown, which was laid down in *Ganpat Putaya v. The Collector of Kanara*(3) already referred to held that section 26 of the Indian Limitation Act (XV of 1877) in which the Crown was not mentioned and which section has since been transferred to the Indian Easements Act with an additional special provision prescribing a period of 60 years for acquisition of rights of easements by limitation against the Crown, was not applicable to the Crown and that no right of easement can be acquired against the Crown under that section.

In *Arzan v. Bhakal Chunder Roy Chowdhry*(4) it was assumed that section 26 which provided a period of only 20 years for acquisition of rights of easement by prescription was applicable as against the Crown. In *Appaya v. The Collector of Vizagapatnam*(5) the question was whether the Crown was bound by the three years period of limitation prescribed for application for execution of decrees, and it was held that it was bound. "We are of opinion that the Government is not entitled to any exemption from the provisions of the Limitation Act relating to applications. If the

(1) I.L.R., 7 Mad., 436.

(3) I.L.R., 1 Bom., 7.

(5) I.L.R., 4 Mad., 155.

(2) I.L.R., 14 Bom., 213 at p. 218.

(4) I.L.R., 10 Cal., 214.

maxim on which the Counsel for the Crown relies applies to this country—and the Crown is not bound by the provisions of any Act unless they are expressly declared binding on the Crown—it may be inferred from the circumstance that this Act contains provisions prescribing a limitation to the Government for the institution of suit and presentation of Criminal appeals, that the Legislature contemplated that the Crown should be bound by the provisions of the Act and should enjoy a privilege to the extent expressed and no further—*expressum facit cessare tacitum*” (pages 156–157). The same view was taken by the High Court of Bombay in *Venubhai v. Collector of Nasik*(1).

In the *Secretary of State v. Narayan*(2) the question as to how far the Crown was bound by the earlier laws of limitation prior to Act IX of 1871, in which the Crown was not at all mentioned, was raised, but not decided (page 185).

Adverting to the English maxim of interpretation that the Crown is not bound by a Statute unless expressly named, Mr. Sedgwick, an American author, observes:—“ But in this country generally I should doubt whether this construction could be safely assumed as a general rule. The English precedents are based on the old feudal ideas of royal dignity and prerogative; and where the terms of an Act are sweeping and universal, I see no good reason for excluding the Government, if not specially named, merely because it is Government ” (‘ Construction of statutory and constitutional laws,’ page 27.) Mr. Endlich, another American author, says:—“ The test, therefore, in every case in which the question whether or not Government is included in the language of a Statute, has to be met and determined, cannot be a mere general rule either one way or the other, arbitrarily applied, but must be the object of the enactment, the purposes it is to serve, the mischief it is to remedy and the consequences that are to follow—starting with the fair and natural presumption that primarily the Legislature intended to legislate upon the rights and affairs of individuals only.”

Turning now to the policy and course of Indian legislation, which, I may say, for upwards of fifty years has been under the direction and control of some of the most eminent English jurists

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(1) I.L.R., 7 Bom., 552, foot-note.

(2) I.L.R., 9 Mad., 175.

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and parliamentary draftsmen—not to say that some of the more important measures were actually drafted and settled by eminent English Judges before being introduced into the Indian Legislative Council,—it is noteworthy that as a general rule Government is specially excluded, whenever the Legislature considered that certain provisions of an enactment should not bind the Government; and this feature is specially noticeable in measures of taxation, whether imperial, provincial or local and whether such taxes are levied by Government or by ‘local authorities’ [X of 1897, 3 (28),] who as a rule have to administer their funds subject to the control of Government. I know of only one instance—possibly there may be a few more, though I doubt it—in which the Crown is expressly included, i.e., section 17 of the Inventions and Designs Act, 1888, which is substantially a reproduction of section 27 of the English Patents, &c., Act, 1883.

By way of illustration I may mention the following instances in which Government has been specially exempted:—

Indian Contract Act, section 74.—The exception provides that when any sum is fixed by way of liquidated damages payable to Government, the whole amount shall be recoverable and not merely reasonable compensation to be fixed by the Court.

Specific Relief Act, section 9.—Government is excepted from the operation of this section under which a summary suit may be brought by a person dispossessed, without his consent, of immovable property otherwise than in due course of Law. Section 45—The Secretary of State for India in Council, the Government of India and the Local Governments are exempted from writs of Mandamus to be issued by the High Court. Section 53 (d)—exempts the various departments of the Government of India and of the Local Governments from writs of injunction.

Indian Registration Act, section 90—exempts from the operation of the Act various documents issued by Government.

Indian Easements Act, section 2 (a) and (b)—exempts certain prerogatives and customary rights of the Crown from the operation of the Easements Act.

The Crown Grants Act XV of 1895—exempts Crown grants from the operation of the Transfer of Property Act, both retrospectively and prospectively.

The Civil Procedure Code, sections 295 (proviso), 356 (b) and 411—preserve the precedence of Crown-debts. 616 (a)—exempts from the operation of the chapter relating to appeals to the Queen in Council, the prerogative rights of Her Majesty to receive and admit appeals.

The Indian Companies Act, section 212 (proviso)—exempts proceedings by Government against Companies in liquidation from being invalidated under the section.

Sea Customs Act, 1878, section 20 (proviso)—exempts goods belonging to Government from liability to customs duties. There is a corresponding exemption in the Indian Tariff Act.

Indian Ports Act, 1889, section 1 (4) i—exempts from the operation of the Act vessels belonging to or in the service of Her Majesty or the Government of India.

Indian Stamp Act, 1899, section 3, proviso (1), is as follows:—
“That no duty shall be chargeable in respect of any instrument executed by or on behalf of or in respect of the Government, in cases where but for this exemption the Government would be liable to pay the duty chargeable in respect of such instrument.”
This is a legislative declaration that but for this exemption Government would be liable to pay stamp duty in cases in which according to the rules laid down in section 29, the liability will devolve upon Government and not upon the other party to the instrument. Such declaration is very significant in that neither in section 29 nor in any other section is Government expressly or by necessary implication included. There is no similar exemption in favour of Government under the Court Fees Act. Government pays Court fees like other litigants and if successful, recovers the same as costs from the adversary and thus it will be seen that Government is really benefited. There is also another weighty reason against the exemption of Government from paying Court fees, for the result of such exemption would naturally be to increase the burden of Court fees upon the rest of the litigants by raising the scale of fees. Under the various Municipalities Acts Government is specially exempted from payment of certain specified tolls and taxes, but not from others. In the City of Madras Municipality Act (Madras Act I of 1884) itself—section 154 (a) exempts “gun-carriages, ordnance carts or wagons, cavalry horses or any vehicle or animal belonging to the Government”

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from payment of taxes on vehicles or animals; section 164 (a) exempts gun carriages, ordnance carts or wagons or other such property of Government from liability to registration and payment of fees therefor; section 174 exempts Government from payment of tolls under 170, the proviso to sections 332, 335 and 338 exempts places in the occupation or under the control of Government from the operation of those respective sections and the necessity for obtaining licences on payment of fees.

Indian Act XI of 1881 has a most important bearing upon the question immediately under consideration. Section 3 provides that, notwithstanding anything contained in any enactment for the time being in force, the Governor-General in Council may by an order in writing prohibit the levy by a Municipal corporation of any specified tax payable by the Secretary of State for India and section 5 provides that so long as any order thus made under section 3 is in force, the Secretary of State shall be liable to pay to the Municipal corporation in lieu of such tax such sums as an officer from time to time appointed in this behalf by the local Government may, having regard to all the circumstances of the case from time to time determine to be fair and reasonable. There is no provision in any of the Municipalities Acts I am aware of, which expressly subjects the Government to any tax or duty payable under the Act. And if the contention on behalf of the petitioner that it is not liable to pay any tax or duty, unless there be express provision imposing the same on Government, be well-founded, there would have been no object in passing the said enactment and it will have to remain a dead letter. The policy of the Indian Legislature is clearly indicated by the said Act XI of 1881, viz., that Government should be liable to Municipal rates and duties unless specially exempted by law; but that when there is no such exemption, the Governor-General should be empowered by law to suspend the ordinary procedure for the levy and collection of a tax or duty payable to a Municipal corporation, without depriving the Municipality of the probable amount which Government would reasonably have to pay if the duty or tax was paid and collected according to the ordinary procedure. A similar policy underlies the Government Buildings Act IV of 1899 and the Indian Tolls (Army) Act II of 1901.

The learned Advocate-General relying upon the observations of Lord Herschell in *Bank of England v. Vagliano Brothers*(1) urges that these and other similar enactments should not be referred to in construing section 341 of Madras Act I of 1884. This contention is, in my opinion, entirely inadmissible and the authority invoked in no way supports it. In that case the question turned upon the construction of section 7 (3) of the English Bills of Exchange Act, 1882, and Lord Herschell, in differing from the Court of Appeal as to the construction of the said provision, observed that "the proper course in the construction of an enactment is in the first instance to examine the language of the Statute and to ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of the law and not to start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view" and that in his opinion, the Bills of Exchange Act was certainly not intended to be a mere Code of the existing law and that it is not open to question that it was intended to alter and did alter it in certain respects and that it should not be presumed that any particular provision was intended to be a statement of the existing law rather than a substituted enactment. He, however, guarded himself by saying that he was, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of a Code and that, for example, if a provision be of doubtful import, such resort would be perfectly legitimate, or again, if in an enactment words be found which have previously acquired a technical meaning or been used in a sense other than their ordinary one, the same interpretation might well be put upon them in the new enactment, and that he gave these merely as illustrations, not as exhausting the category.

This rule of interpretation was followed in *Robinson v. Canadian Pacific Railway Company*(2) in regard to the construction of a section in the Civil Code of Lower Canada and recently in

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(1) [1891] A.C., 107 at pp 114, 145.

(2) [1892] A.C., 481 at p. 487.

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an Indian case in *Norendra Nath Sircar v. Kamalbasini Dasi*(1) in construing section 111 of the Indian Succession Act, which section was incorporated in the Hindu Wills Act. In the last-mentioned case it was held that a Statute intended to embody in a Code a particular branch of the law must be construed according to the natural meaning of the language used and not on the presumption that it was intended to leave the existing law unaltered.

The principle of interpretation affirmed in these cases in each of which the question turned upon the construction of a section in a statutory Code does not in the least militate against the long established rule of construction that in regard to the construction of any particular Act, recourse may and ought to be had to other Acts of similar scope on similar subjects (vide *Colquhoun v. Brooks*(2)) and that Acts which are *in pari materia* "are to be taken together as forming one system" and though made at different times or even expired and not referring to each other, they shall be taken as "interpreting and enforcing each other."

Instead of trying to interpret section 311 of Madras Act I of 1884, "by roaming over a vast number of authorities in order to discover by a minute and critical examination" what the case law in England is as to the exemption of the Crown from the payment of tolls, poor-rates and other taxes imposed by Statutes—a course deprecated by Lords Henschell and Macnaghten in the cases above referred to,—it will certainly be much safer to interpret the section with reference to the course of Legislation in India and the Acts already referred to in *in pari materia* with Madras Act I of 1884.

The conclusions, therefore I come to are, that—

- (i) the canon of interpretation of Statutes that the prerogative or rights of the Crown cannot be taken away except by express words or necessary implication, is as applicable to the Statutes passed by the Indian Legislatures as to Parliamentary and Colonial Statutes; and this is really concluded by the authority of the Privy Council in more appeals than one from the Colonies;

(1) L.R., 23 I A., 18 at p 26, I L.R., 23 Calc., 563.

(2) L.R., 14 App. Cas., 493 at p. 511.

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- (ii) when in an Indian Act the Crown is not expressly included and the question is whether it is bound by necessary implication the course of Indian Legislation and Acts *in pari materia* with the Act in question will have an important bearing upon the construction of the Act;
- (iii) notwithstanding that in several Indian enactments the Crown has been specially exempted, the above rule of interpretation will nevertheless hold good in construing the provisions of an enactment from the operation of which the Crown is not expressly exempted, when a question is raised as to whether such provisions take away a right, or prerogative of the Crown;
- (iv) the said rule, based like other cognate rules of construction upon the maxim "*generalia specialibus non derogant*" is not really a prerogative of the Crown, though such rule as well as the rule relating to the construction of Crown-grants are dealt with in treatises under the head of "prerogatives of the Crown" and also loosely referred to as such in some English decisions;
- (v) the English law as to the exemption of the Crown and Crown property from payment of tolls, poor-rates and other taxes, local or imperial, imposed by Statutes rests partly upon historical reasons and principally upon judicial decisions which do not proceed upon a course of reasoning or principle which will be binding on Indian Courts;
- (vi) exemption from payment of tolls, rates and taxes is not in reality a prerogative of the Crown, but depends solely upon the right construction to be put upon the Crown-grant or the Statute in question;
- (vii) since the passing of the Indian Councils Act, 1861, not only the Viceregal Council but also the Provincial Councils can, without obtaining the previous sanction of the Crown, make laws affecting the prerogatives of the Crown, when such prerogatives have no relation to any of the matters specially exempted from their respective legislative jurisdictions;

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(viii) even if the imposition of a duty or tax upon Crown property be regarded as affecting the prerogative of the Crown, it is competent for the Provincial Legislatures to impose such duty or tax, which will be payable out of the current public revenue, measures affecting which or imposing charges whereon, are specially contemplated by section 38 of the Indian Councils Act, as being within the competence even of Provincial Legislatures;

(ix) according to the uniform course of Indian legislation, Statutes imposing duties or taxes bind Government as much as its subjects, unless the very nature of the duty or tax is such as to be inapplicable to Government, and whenever it is the intention of the Legislature to exempt Government from any duty or tax which in its nature is not inapplicable to Government, the Government is specially exempted, and this is specially so in regard to taxes imposed by the Legislature for the benefit of local authorities, and in particular, Municipalities;

(x) timber brought into the City of Madras, by or on behalf of Government, is liable to the duty prescribed by section 341 of Act (Madras) I of 1884.

The revision petition therefore fails and ought to be dismissed.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

VIRARAGHAVA AYYANGAR (DEFENDANT), APPELLANT,

v.

KANAGAVALLI AMMAL (PLAINTIFF), RESPONDENT.*

1901
November 1.

Rent Recovery Act (Madras)—Act VIII of 1865, s. 15, 17, 18—Statement of place in which distrained property is kept—"The property is with the distrainer"—Sufficiency—Maintainability of suit

In a suit instituted under section 18 of the Rent Recovery Act to set aside a distraint on the ground that it had been illegally carried out, plaintiff complained that the authority to distrain did not contain the particulars required by section 15 of the Act. The property, which consisted of some small jewels, was described as being "with the distrainer."

Held, that with regard to property of this description the statement was sufficient.

Whether the failure to state the place where property which has been distrained is kept is a ground for a suit under section 18 of the Rent Recovery Act to set aside the distraint—*Quære*.

SUIT under section 18 of the Rent Recovery Act, to set aside a distraint. The Deputy Collector found that there were no grounds to set it aside and dismissed the suit. Plaintiff appealed to the District Judge who said:—"There are several grounds of appeal, but it is unnecessary to consider more than one, the allegation that the distraint was made illegally. Under section 15, Act VIII of 1865, the distrainer is bound to furnish the defaulter with a copy of his authority to distrain, with various particulars, among others, the name of the place in which the distrained property is kept. This was not done in the present case, the entry in the copy given to the plaintiff being 'The property is with distrainer'. I am of opinion that this is a material irregularity. The defaulter is entitled to know the actual place in which the property is kept, and a statement that it is with the distrainer, gives no information on the subject. The distraint was therefore illegal, and the plaintiff is entitled to have it set aside." He reversed the judgment of the lower Court.

Defendant preferred this second appeal.

* Second Appeal No. 109 of 1901 against the decree of G. W. Elphinstone, Acting District Judge of Trichinopoly, in Appeal Suit No. 113 of 1899, reversing the decree of P. Dorasami, Deputy Collector of Ariyalur, in Summary Suit No. 1 of 1899.

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Sundara Ayyar and *K. Srinivasa Ayyangar* for appellant.
V. Krishnasami Ayyar for respondent.

JUDGMENT.—We doubt whether the failure to state the place where the distrained property is kept can ever be a ground for a suit under section 18 of the Rent Recovery Act to set aside the distraint. The appropriate remedy seems rather to be, under section 17 of the Rent Recovery Act, to apply to the Collector for an order to restore the distrained property to the owner, if such omission was a material irregularity. However that may be, we are satisfied that, in the present case, in which the property distrained consisted of some small jewels, the statement that they were “with the distrainer” was a sufficient statement of the place where they were kept, within the meaning of section 15 of the Act. It is difficult to see what more information the plaintiff could have required for any practical purpose. Moreover, this objection was not taken before the Deputy Collector or even in the grounds of appeal to the District Judge, a fact which shows clearly enough that it was of no real materiality in the eyes even of the plaintiff.

As the District Judge decided the appeal on this preliminary point, we set aside his decree and remand the appeal for disposal according to law. Costs in this Court will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1901.
November 13.

SURYANARAYANAMURTI AND ANOTHER (DEFENDANTS
Nos. 2 AND 3), APPELLANTS,

v.

TAMMANNA AND ANOTHER (PLAINTIFF AND DEFENDANT No. 1),
RESPONDENTS.*

Specific Relief Act—Act I of 1877, s. 42—Suit for declaration of invalidity of will on ground that it bequeathed family property—No claim for partition—Maintainability—Hindu Law—Existence of leases over family property no bar to partition.

Plaintiff sued his brother, his sister and his brother's son, for a declaration of invalidity of a will which purported to have been executed by his late father, by which certain property had been bequeathed to one of the defendants. Plaintiff

* Appeal No. 96 of 1900 against the decree of C. G. Kappusami Ayyar, Subordinate Judge of Cocanada, in Original Suit No. 61 of 1898.

claimed that the property was ancestral; that he was entitled to his share in it by right of survivorship and that the testator had no power to bequeath it. No claim was made in the plaint for partition of the property, which was stated to be in the possession of tenants under leases granted by plaintiff and first defendant:

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Held, that the suit was barred by the proviso to section 42 of the Specific Relief Act, inasmuch as plaintiff might have sued for partition of his share in what he claimed to be the joint family property. Even though the land were in the possession of tenants entitled to continue in occupation under subsisting leases, that would be no bar to a partition of the property among the members of the family.

SUIT for a declaration that a will was illegal and invalid. Plaintiff and first defendant were brothers, being sons of one Venkataratnam Garu, deceased; third defendant was their sister; and the second defendant was the son of first defendant. Plaintiff charged defendants with having fabricated a will by which the late Venkataratnam Garu purported to bequeath to second defendant the property which had fallen to Venkataratnam in a division with his brothers in 1895. He claimed that the property was ancestral; that he was entitled to it by right of survivorship and that the testator had no power to bequeath it. Defendants pleaded the genuineness of the will, and claimed that the property bequeathed by it was the self-acquired property of the testator and not ancestral. They also contended that the suit was barred by section 42 of the Specific Relief Act, inasmuch as it was for a declaration without a further claim for possession of the property. The Subordinate Judge held that the suit was maintainable as the property was in the possession of tenants who had executed leases in favour of plaintiff and first defendant. He declared that the will was illegal and invalid.

Defendants Nos. 2 and 3 preferred this appeal.

V. Krishnasami Ayyar and *Nagabhushanam* for appellants.

Sundara Ayyar and *K. Subrahmania Sastri* for respondent No. 1.

Raghava Ayyangar for respondent No. 2.

JUDGMENT.—A preliminary objection is taken that the suit is barred by the proviso to section 42 of the Specific Relief Act, 1877. An issue was raised on this point in the lower Court, but the Subordinate Judge held that the objection was invalid, because the lands in suit were in the possession of tenants under leases granted by plaintiff and first defendant.

We are unable to concur in this view. The leases, we observe, were granted in the life-time of the father of the plaintiff and

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first defendant, and were for a year only and had expired before the suit was filed. But even if the leases were subsisting leases granted after the father's death it would make no difference in the decision of the present question. The proviso to section 42, Specific Relief Act, prohibits the Court from granting a declaration like that asked for in this suit "where the plaintiff being able to seek further relief than a mere declaration of title omits to do so." Here it was open to the plaintiff to have sued for partition of his share in the joint family property, if it was joint family property as alleged by plaintiff. That was a further relief of a very substantial character, and even if the land were in possession of tenants entitled to continue in occupation it would be no bar to a partition of the property among the members of the family, the tenant's right of occupation, if any, not being affected by such partition. We do not think that the suit is one in which we should allow the plaint to be amended at this stage and the suit converted into a partition suit, as the objection was taken from the very beginning and plaintiff notwithstanding persisted in continuing the suit as framed.

On the preliminary ground stated above we must set aside the decree of the Subordinate Judge and dismiss the plaintiff's suit against all the defendants with costs throughout.

No order is required on the memorandum of objection.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1901.
November 26.

KRISHNA AYYAR (PETITIONER—DEFENDANT No. 1), APPELLANT,

v.

MUTHUSAMI AYYAR (COUNTER-PETITIONER—PLAINTIFF),
RESPONDENT.*

Transfer of Property Act—Act IV of 1882, s. 89—Order absolute for sale—Notice to defendant of application—Practice.

Notice need not be given to a defendant before an order absolute for sale is made under section 89 of the Transfer of Property Act.

* Civil Miscellaneous Second Appeal No. 34 of 1901, against the order of G. F. S. Power, District Judge of Tanjore, in Civil Miscellaneous Appeal No. 675 of 1900 affirming the order of A. Rajagopala Ayyar, District Munsif of Mayavaram, in Miscellaneous Petition No. 785 of 1900 (Original Suit No. 216 of 1899),

PETITION under section 305 of the Code of Civil Procedure, by a judgment-debtor, for postponement of a sale to enable him to raise the amount due. The decree, which had been passed on a hypothecation bond, allowed six months for payment, which period had expired. Petitioner relied upon the fact that he had received no notice of the proceedings taken by plaintiff for the passing of an order absolute. The District Munsif held that no notice was necessary and rejected the petition. The District Judge, on appeal, said:—"I do not think the District Munsif is wrong. Section 89 of the Transfer of Property Act does not say that notice must be given before an order absolute for sale is made and I cannot, therefore, hold that the omission to give notice makes such order illegal." He dismissed the appeal.

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Defendant No. 1 preferred this second appeal.

Kasturiranga Ayyangar for appellant.

Sivasami Ayyar for respondent.

JUDGMENT.—The application having been made within one year after the passing of the decree, no notice of the application for an order absolute for sale is necessary. Section 89 of the Transfer of Property Act does not require any notice to be given. We may add that the appellant does not show that he was in any way prejudiced by the want of such notice.

We dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

SESHAMMA SHETTATI AND OTHERS (PLAINTIFFS), APPELLANTS.

v.

CHICKAYA HEGADE AND OTHERS (DEFENDANTS Nos. 1
AND 3 TO 8), RESPONDENTS.*

1902.
February
4, 14

Limitation Act—Act XV of 1877, sched II, art. 139—Claim for more than twelve years by tenants from year to year of permanent occupancy rights, to knowledge of landlord—Determination of lease.

A person who has lawfully come into possession of land as tenant from year to year or for a term of years, or as mortgagee, cannot, by setting up, during the

* Second Appeal No. 482 of 1900, against the decree of J. W. F. Dumergue, District Judge of South Canara, in Appeal Suit No. 197 of 1899, affirming the decree of M. Deva Rao, Acting District Munsif of Kundapur, in Original Suit No. 200 of 1898.

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continuance of such relation, any title adverse to that of the landlord, or mortgagor, as the case may be, inconsistent with the real legal relation between them—and that however notoriously and to the knowledge of the other party—acquire, by the operation of the law of limitation, title as owner, or any other title inconsistent with that under which he was let into possession. In the case of a mortgage, the title of the mortgagor will be extinguished only at the expiration of the period prescribed for the redemption of the mortgage, and in the case of a lease, the landlord's title can be extinguished only at the expiration of the period prescribed by article 139 of the Limitation Act, and under that article such period will commence to run only when the tenancy is determined.

SUIT to recover land. In the year 1832, Soma Shetti gave an usufructuary mortgage over the land to Devappa Kamti. Soma Shetti died, and was succeeded by Venkappa Shetti. In 1870, a sub-mortgagee sought to recover possession of a portion of the land, and in that suit, the mortgagee was first defendant, Venkappa Shetti, the proprietor, was second defendant, and the present first defendant, Chickaya Hegade, was third defendant. Chickaya Hegade then set up a right of permanent lease, which was denied by Venkappa Shetti. In 1887, the land was bought by Shidayya Hegade, the brother of plaintiffs Nos. 2 to 5, in execution of a decree. Shidayya Hegade gave half of the land to the first plaintiff, and he and first plaintiff redeemed the mortgage in 1891. They then gave notice to the defendants, who, they contended, were tenants from year to year under the usufructuary mortgagee, to vacate the land, but the defendants refused, alleging that the land had been given to their assignors by the proprietor, (apparently in conjunction with the mortgagee), on a permanent lease. They now contended that the suit was barred by limitation. The District Munsif upheld the latter plea. He said the plaintiffs had purchased the rights of Venkappa Shetti, who, in 1870, had notice of the right of permanent lease set up by first defendant. He held that the possession of first defendant had become adverse as from 1872, and that plaintiffs had purchased with notice, and that their position was not better than that of Venkappa Shetti. He dismissed the suit.

Plaintiffs appealed to the District Judge, who also relied upon the circumstance that Venkappa Shetti had, in 1870, been aware that first defendant had set up a permanent occupancy right in that year, which Venkappa Shetti had never sought to set aside. He held that plaintiffs' brother had bought the land with clear notice of all the facts, and that plaintiffs were in the same position as

the mortgagor He confirmed the decree of the lower Court and dismissed the appeal

Plaintiffs preferred this second appeal.

Ramachandra Rao Saheb and *K. P. Madhava Rao* for appellants.

K. Narayana Rao for respondents Nos 2 to 7.

JUDGMENT.—The proprietor of the land in question mortgaged it with possession to one Devappa Kamti in 1832. The plaintiffs, as the assignees of the equity of redemption, discharged the mortgage-debt and redeemed the mortgage in 1894. It is alleged in the plaint that the defendants have been holding the land as tenants from year to year under the usufructuary mortgagee, that the tenancy has been terminated by due notice to quit given by the plaintiffs and the suit is accordingly brought to eject them from the land. The defendants contend that the land was given to their assignors by the proprietor, apparently in conjunction with the mortgagee, on a permanent lease, that out of the total annual rent of Rs 130-14-9 they have been paying Government assessment and the balance of Rs 60 to the mortgagee and that subsequent to the redemption of the mortgage by the plaintiffs, they remitted the said sum of Rs 60 by postal money order to the plaintiffs who refused to accept the same. They also contend that plaintiffs' suit to eject them is barred by the law of limitation.

If, as alleged by the plaintiffs, the defendants came into possession of the land as tenants under the mortgagee, plaintiffs' title to eject them is clear, whether the mortgagee let them into possession as tenants from year to year or professed to let them as tenants with a permanent right of occupancy. A permanent lease granted by a mortgagee can hold good only as against the mortgagee and that until the redemption of the mortgage. It cannot bind the mortgagor or persons claiming under him. Whether a tenancy created by a mortgagee will *ipso facto* terminate with the redemption of the mortgage or whether it can be determined only by the mortgagor giving notice to quit as in the case of a tenant from year to year, it is unnecessary to consider in this case, as in fact notice to quit has been given and the suit brought within four years after the redemption of the mortgage.

But if, as alleged by the defendants, their right of permanent occupancy is founded upon a lease granted by the mortgagor, the

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plaintiffs, of course, are bound by such lease and they cannot sue to eject the defendants. This is the substantial question in the case, but both the Courts have dismissed the suit as barred by the law of limitation, under article 144 of the Limitation Act, on the ground that the defendants have, to the knowledge of the plaintiffs, or rather their predecessor in title, been setting up a right of permanent occupancy for upwards of 12 years before date of suit and that plaintiffs became assignees of the equity of redemption, with notice of such claim on the part of defendants.

The suit being brought by the plaintiffs, as landlords, to recover possession from tenants, the article of the Limitation Act applicable thereto is *prima facie* article 139 and certainly, according to the case of the defendants, that article must govern the suit. Article 144 of the Limitation Act can be applied only to a suit not otherwise specially provided for, and if a suit be otherwise specially provided for, the defendants' plea of adverse possession, for whatsoever length of time, is perfectly immaterial for purposes of limitation. Both the lower Courts have fallen into an error (*Runchadas Vandravandas v. Parvathy Bhai*(1) by no means an uncommon one, that every other article of the law of limitation relating to immoveable property should be subordinated or read subject to article 144 and have dismissed the suit as barred by the law of limitation, notwithstanding that, according to the defendants' own case, they did not come into possession of the land as trespassers, but as tenants let in by the plaintiffs' predecessor in title.

The land in question was held in proprietary right under a raiyatwari settlement with Government by the plaintiffs' predecessor in title and if, as the defendants allege, they derived a permanent right of occupancy therein from such proprietor—the onus of establishing which is entirely on them (*Rangasami Reddi v. Gnanasammantha Pandara Sannadhi*(2), and the unreported decision in *Chedambara Pillai v. Tirumengadath Ayyangar*(3) therein cited)—it is, of course, a complete answer to the plaintiffs' suit, inasmuch as it is not based on the footing of the defendants having incurred a forfeiture of a permanent right of occupancy and the suit is bound to fail on that ground

(1) L.R., 26 I A, 71, I.L.R., 23 Bom., 725

(2) I.L.R., 22 Mad., 264

(3) Appeal No. 1 of 1886 (unreported).

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In considering the question of limitation, and dismissing the suit on such preliminary ground, it must, of course, be assumed that the plaintiffs' case, *ie*, that the defendants came into possession of the lands as tenants from year to year and not as permanent tenants—as alleged by the defendants—is true. If so, it is impossible to uphold the decision of the lower Courts that the defendants have, by adverse possession extending over a period of 12 years acquired, under the combined operation of article 144 of the schedule II and section 28 of the Limitation Act, the limited right of permanent occupancy subject to the payment of a fixed rent. Defendants do not say that they came into possession of the land really as trespassers, though professing to have come into possession as permanent lessees—in which case no doubt article 144 would be applicable; nor do they say that the plaintiffs' predecessor in title was dispossessed or that he discontinued possession of the land and that they have taken possession claiming to hold under a permanent right of occupancy—in which case article 142 would be applicable, the result in either case being the same. A person who lawfully came into possession of land as tenant from year to year or for a term of years, or as mortgagee, cannot, by setting up, during the continuance of such relation, any title adverse to that of the landlord or mortgagor, as the case may be, inconsistent with the real legal relation between them,—and that however notoriously and to the knowledge of the other party—acquire, by the operation of the law of limitation, title as owner or any other title inconsistent with that under which he was let into possession. In the case of a mortgage, the title of the mortgagor will be extinguished only at the expiration of the period prescribed for redemption of the mortgage, and in the case of a lease, the landlord's title can be extinguished only at the expiration of the period prescribed by article 139 of the Limitation Act, and under the latter article such period will commence to run only when the tenancy is determined. A reference to section 111 of the Transfer of Property Act will show when a tenancy in respect of immoveable property determines. If, after the determination of the tenancy, the tenant remains in possession as trespasser for the statutory period, he will, by prescription, acquire a right as owner or such limited estate as he might prescribe for. A person coming into possession of land under a lease which is

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invalid or void as against the person seeking to eject him is really a trespasser and as such, after the expiration of the period prescribed by article 144, acquires by prescription the limited right under the lease, whether it be a lease for a term of years or a lease in perpetuity.

In the present case, on the footing that the defendants were let into possession by the mortgagee, whether as tenants from year to year or professedly as tenants with a permanent right of occupancy, the tenancy between them and the mortgagee would have continued until the redemption of the mortgage in 1894, and such possession cannot be adverse either to the mortgagee or much less to the mortgagor, and the plaintiffs' cause of action would have accrued—and the period of limitation commenced to run—only in 1894, if such tenancy ceases by the mere fact of redemption, or subsequent thereto, when the term of notice to quit had expired, if the right view should be that a lease given by the mortgagee as being incidental to the management of the mortgaged property, is binding upon the mortgagor—at any rate, as a lease from year to year,—until he determines the same

If, as alleged by defendants, they were let into possession by plaintiffs' predecessor in title as tenants, but they fail to establish that they were let into such possession with rights of permanent occupancy, their position will be only that of tenants from year to year (see *Vasudeva Patrudu v. The Zamindar of Sahur*(1)) and they can acquire by prescription no right of permanent occupancy by the fact that they were setting up a right of permanent occupancy, to the knowledge of plaintiffs' predecessor in title for upwards of twelve years before date of suit (*Srinivasa Ayyar v. Muthusami Pillai*(2)).

There being in this case no plea of dispossession of the mortgagee by the defendants or their assignors, as trespassers, it is unnecessary to consider whether in the case of such forcible dispossession, there could be any adverse possession against the mortgagor, within the meaning of article 144 of the Limitation Act, until the mortgagor had redeemed the mortgage (*Ammu v. Ramakishna Sastri*(3); *Vittobha Bm Chaba v Gangaram*(4); *Puttappa v. Timmayya*(5); *Chento v. Janki*(6)).

(1) 3 M.H.C.R., 1.

(3) I.L.R., 2 Mad., 226

(5) I.L.R., 14 Bom., 176.

(2) I.L.R., 24 Mad., 246.

(4) 12 Bom. H.C.R., (A.C.J.), 180.

(6) I.L.R., 18 Bom., 51.

In support of the position that a tenant cannot, by the operation of the law of limitation, prescribe for a higher title than he has under the tenancy, by setting up such higher right during the tenancy, I may quote the following passage from the judgment of their Lordships of the Judicial Committee of the Privy Council in *Maharani Beni Pershad Koeri v. Dudh Nath Roy*(1):—"Their Lordships, however, think that the argument fails on a broader ground. They have already expressed their opinion that Ramgolam was, at that time, entitled to hold the mouzah for his life and that no suit for possession could then have been brought against him. And they do not think that a mere notice by a person holding for his life, that he claimed to be holding on a hereditary or perpetual tenure, would make his possession adverse within the meaning of the Limitation Act so as to bar a suit for possession on expiration of the life tenancy. Even if, therefore, the plaint of 1879 did convey the notice which the respondent attributes to it, their Lordships do not think it would support the defence of limitation."

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The case of *Budesur v. Hanmanta*(2), relied upon by the District Judge—in which it was held that a "landlord allowing the tenant to assert the validity of an invalid lease for the statutory period of more than twelve years may be debarred from subsequently questioning the right of the tenant to hold under its terms"—proceeds upon the footing that the tenancy alleged by the landlord to be only from year to year was determined and a suit brought to eject the tenant was dismissed for default of prosecution. According to the case of the landlord, therefore, the tenant remained in possession as a trespasser. He, however, having claimed to hold possession as a tenant with a permanent right of occupancy and such possession having continued for upwards of twelve years after the tenancy was determined, according to the case of the landlord, it was held that he acquired a right of permanent occupancy by prescription. That case is thus clearly distinguishable from the present one.

The case of *Drobomoyi Gupta v. Davis*(3) is also clearly distinguishable from the present case. In that case a Hindu widow granted a permanent lease to certain tenants, which, on her death, was void as against her two daughters, the survivor of whom

(1) L.R., 26 I.A., 216 at p. 224, I.L.R., 27 Calc., 156.

(2) I.L.R., 21 Bom., 509

(3) I.L.R., 14 Calc., 323 at p. 345.

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died nearly twenty years after the death of the widow. The lessees having, as trespassers from the date of the death of the widow, continued to hold the lands for upwards of the statutory period, professing to hold the same as permanent tenants under the lease granted by the widow, it was held (at page 345) that they had acquired a right of permanent occupancy by prescription against the daughters and therefore, under the provisions of the Limitation Act (XIV) of 1859, also as against the male reversionary heirs who succeeded the surviving daughter.

In *Gossain Dalmar Puri v Bepin Behary Mitter*(1), a permanent lease of certain mouzahs was granted by the judgment-debtor, after his right, title and interest therein had been sold in execution of the decree and the purchaser, who obtained only symbolical possession against the judgment-debtor in a suit brought by him for the recovery of his shares, against the judgment-debtor and his co-sharers, subsequently brought a suit against the alleged permanent lessee to recover possession of the share purchased by him. The lessee having been let into possession under a permanent lease by the judgment-debtor, it was void as against the prior purchaser, and the lessee, therefore, was in possession really as a trespasser as against the purchaser, professing to hold for upwards of thirteen years the land as a permanent lessee. It was, therefore, held that he acquired a right of permanent occupancy by prescription.

The decision of the Privy Council in *Tekaetnee Goura Coomaree v. Mussamat Saroo Coomaree*(2) which was also cited on behalf of the respondent has no bearing upon the present case. In that case the plea of limitation was overruled on the ground that the landlord had had no notice that the tenant was claiming a permanent right of occupancy. It also appears in that case that, according to the plaintiffs' case, the tenant was holding wrongfully after the termination of a lease for a term of years.

In *Marden Saiba v. Nagapa*(3), the tenant had a permanent lease granted to him of certain lands, but he trespassed and encroached upon certain lands not comprised in the lease and professed to hold the same as if it was part of the land comprised in the lease, and such trespass and encroachment having continued

(1) I.L.R., 18 Calc., 520.

(2) 19 W.R., (C.B.), 252.

(3) I.L.R., 7 Bom., 96.

for upwards of twelve years, it was held that he had acquired a right of permanent occupancy as regards that land also, by the operation of the law of limitation

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It will thus be seen that in the cases above referred to, in which it was held that title to a right of permanent occupancy in land subject to the payment of a fixed rent was acquired by the operation of the law of limitation, the person who thus acquired title was, at the time from which the period of limitation was reckoned, in possession of the land really as a trespasser under an invalid lease or under a lease which prior thereto had been determined either by the landlord having given notice to quit or otherwise.

The District Judge having disposed of the appeal on the preliminary question of limitation, alone, which forms the subject of the seventh issue, and as his finding on that issue cannot be supported the decree is reversed and the appeal remanded to him for disposal according to law, with reference to the remaining issues in the case. The costs of this second appeal will abide and follow the result

ORIGINAL CIVIL.

Before Sir Arnold White, Chief Justice.

*IN RE LAKSHMINARAYANA AMMAL, DECEASED **

1902.
February
14.

Court Fees Act—Act VII of 1870, sched I, item 11—Will by husband conferring general power of appointment over a fund on his wife—Payment of probate duty on the fund on the husband's decease—Exercise of the power by the wife by will—Decease of wife—Liability of her estate for probate duty in respect of the power—"Property."

By his will, A directed that Rs 7,000 out of his property should be lent out at interest, that the interest derived from time to time should be added to the principal amount, and that the amount so accruing should be paid to whoever B, his wife, by her will, should appoint. A died and his will was proved, probate duty being paid on the principal amount of Rs. 7,000. B executed a will in which she exercised the power of appointment and also died. Her executor now applied for probate of her will, and the question was raised whether he was liable to pay probate duty on the fund or any part thereof

* Testamentary Petition No. 38 of 1902.

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Held, that the power of appointment created by the will was property, within the meaning of section 11 of the Court Fees Act and the estate of the testatrix was liable to probate duty in respect thereof

In the goods of George, (6 B L R , Appx , 138), commented on.

PETITION for probate. The facts of the case are set out in the headnote and in the judgment

JUDGMENT.—In this case the testatrix by her will exercised a general power of appointment created by the will of her deceased husband. The will of the testatrix recites that by the will of her deceased husband it was stated that Rs 7,000 out of his property should be lent out on interest, that the interest derived from time to time should be added to the principal amount and that the amount so accruing should be paid to those whom the testatrix might appoint by will. The fund has been paid into Court under an order made in a suit to administer the husband's estate and now stands invested in Government promissory notes. The will of the testatrix appointed an executor and directed that he should take the "aforesaid amount" after payment of debts and funeral expenses, should pay certain specified amounts to certain specified persons and the residue to A B.

On the death of the husband of the testatrix, his will was proved and probate duty was paid on the principal amount of Rs 7,000. The executor appointed by the will of the testatrix now applies for probate of her will, and the question is whether the executor is liable to pay probate duty on the fund or any part thereof. Under item 11 of the first schedule to the Court Fees Act, the fee payable is a percentage on "the amount or value of the property in respect of which the grant of probate is made." The form in schedule III (which was first introduced in the amending Act of 1899) requires the executor to state on affidavit that he has truly set forth all the property and credits of which the deceased died possessed or was entitled to at the time of his death and which had come or were likely to come to the hands of the executor.

In my opinion the testatrix's power of appointment to the fund is "property" within the meaning of item 11 of the schedule and of the statutory form of affidavit as to valuation. It seems to me that section 19C has no application since the grant which is now applied for is clearly not a "like grant" to that which was obtained in respect of the husband's estate. The two estates are

different. There appears to be a conflict of authority upon the question whether, where a general power of appointment over a fund is exercised by will, the appointed fund passes to the executor, as executor. For the purposes of section 9. sub-section (1), of the English Finance Act, 1894, Buckley, J., has held that it does; see *In re Moore*(1), whilst Kekewich, J., and Byrne, J., have held that it does not, see *In re Treasure*(2), *In re Maddock*(3) and *In re Pouer*(4). It is not necessary, however, to discuss these decisions since, as it seems to me, the question turns on whether the general power of appointment which the testatrix enjoyed is "property" in respect of which the grant is applied for. I think it is "Property is the most comprehensive of all terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have" per Langdale, M. R., in *Jones v. Skinner*(5). The testatrix took no life interest under the will of her husband, but it is clear that the power gave her an interest which she can exercise to her own advantage. For instance, she might have contracted debts and made the creditor one of the appointees.

Under section 27 of the English Wills Act, a gift of all a testator's property passes everything over which he has a general power of appointment, and, under section 78 of the Indian Succession Act, a general bequest of property includes property as to which the testator has a general power of appointment by will. An enactment which imposes a duty or a penalty must no doubt be construed strictly, but I see no good reason for placing a more restricted interpretation on the word "property" as used in the schedule to the Court Fees Act than that which the Legislature has declared it shall bear for the purpose of the construction of a will. With regard to the case of *In the goods of George*(6) to which my attention was called by Mr King, all I can say is that I find myself unable to agree with it. In that case the widow took a life estate with a power of appointment by deed or will among children. Sir Richard Couch was of opinion that the words in the schedule to the Indian enactment if read literally would make the property over which the power was exercised liable to duty, but he considered the case to be substantially the same as if it had arisen under the English Act (36 Geo. III, cap. 52, s 18), and he held

(1) [1901] 1 Ch., 691.

(3) [1901] 2 Ch., 372.

(5) 5 L.J., Ch., 87 at p 90.

(2) [1900] 2 Ch., 648.

(4) [1901] 2 Ch., 659

(6) 6 B.L.R., Appx, 138.

In re
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that duty was not payable on the authority of *Drake v. The Attorney-General*(1) Under the will in question in that case there was a life interest to the testator's daughter with a power of appointment by will among such persons as the daughter might appoint other than certain persons named in the will. The House of Lords, affirming the Court of Exchequer (see *Constables, &c., of Chorlton v. Walker*(2)), held that, the property appointed by the daughter was not liable to duty. This decision turned entirely upon the construction of section 18 of the Act of Geo. III. The enactment which was in force when the case of *In the goods of George*(3) was considered by Sir Richard Couch was 23 Vict., cap. XV, s. 4, and this enactment expressly provides that duty shall be payable in respect of the personal estate which any person disposes of by will under any authority enabling such person to dispose of the same as he thinks fit.

I decide this case upon the short ground that the power of appointment created by the husband is property within the meaning of that word as used in the Court Fees Act, and I hold that the estate of the testatrix is liable to probate duty in respect thereof.

As regards funeral expenses I think Rs. 200 may be allowed free of duty.

Mr. H. C. King—Attorney for petitioner.

(1) 10 Cl. & F., 257

(2) 10 M. & W., 742 at p. 756.

(3) 6 B L R., Appx., 138.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

RAMALINGA MUPPAN AND OTHERS (PLAINTIFF AND HIS LEGAL REPRESENTATIVES), APPELLANTS,

1901.
October 11,
24.

v.

PAVADAI GOUNDAN (DEFENDANT No. 2), RESPONDENT ¹

Hindu Law—Sudras—Division of property by brothers—Two sons born to one divided brother by concubine—Decease of both illegitimate sons, leaving sons of their own—Claim by divided brother against the grandsons for property of the deceased divided brother

Plaintiff and R were divided brothers in a family of Sudras. R kept a permanent concubine, by whom he had two illegitimate sons. Both of these sons predeceased R, leaving legitimate sons of their own then surviving. R then died. Plaintiff now sued, claiming to be his heir, to recover his property, which was in the possession of R's grandsons.

Held, that plaintiff was not entitled to recover.

Whether an illegitimate son of an illegitimate son could, on the principle of *jus representationis*, represent the illegitimate son if, before the inheritance opened, the latter predeceased his father—*Quere*

SUIT for a declaration and for possession of land. Plaintiff claimed as heir to Ranga Muppan, his deceased brother. He admitted that he and Ranga Muppan had lived separately as divided brothers, but alleged that his brother had died without issue. The defendants denied plaintiff's right to succeed Ranga Muppan. They agreed that Ranga Muppan had separated from his family; and their case was that he had kept a concubine, by whom he had two sons, namely, Madurai Goundan, who was the father of first defendant, and Narayana Goundan, who was the father of defendants Nos 2 and 3; that both Madurai and Narayana had predeceased Ranga Muppan, and that in consequence the defendants were heirs to Ranga Muppan and not the plaintiff. The defendants were the legitimate sons of Madurai and Narayana Goundan, respectively.

The Munsif held that even if the deceased Madurai and Narayana Goundan were the illegitimate sons of Ranga Muppan,

* Second Appeal No 581 of 1900 against the decree of D Broadfoot, District Judge of South Arcot, in Appeal Suit No 242 of 1899, reversing the decree of T S Thiagaraja Ayyar, Acting District Munsif of Tirukolur, in Original Suit No. 832 of 1898.

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(a relationship which plaintiff questioned), plaintiff was entitled to succeed as heir. After discussing the position at some length he said:—"There being no co-parcenary between a person and his illegitimate son, much less does it exist between the former and the son of the latter; therefore the principle on which legitimate sons, grandsons and great-grandsons have been held to take at once as a single heir does not apply in the case of an illegitimate son or his descendants, for these take no interest by birth and are not members of any co-parcenary with the owner. For these reasons, I am inclined to hold and accordingly find that the defendants have no right to succeed to the plaint lands, but that the plaintiff is entitled thereto as the heir to Ranga Muppan." He decreed accordingly.

Defendants appealed to the District Judge, who held that Madurai and Narayana Goundan were the sons of Ranga Muppan, by his permanent concubine. Considering their legal rights, he said:—"As far as I know, the exact point of law involved in the present case has never been settled by the High Court. In *Rahu v. Govind Valal Teja*(1), I find that the opinion of Messrs West and Buhler stated to the following effect, without any limitation or disapproval 'In the case of a separate Sudra his property, on failure of legitimate descendants, is inherited by his illegitimate sons or grandsons.' In Mayne, section 508, I find that the English rule which prevents a bastard tracing to his father has no existence in Hindu law. If the illegitimate son can trace to the father, I see no reason why the son of such son cannot have the same advantage. In the case (*Chenju v. Chimmu*(2)) referred to by the lower Court, we no doubt find the phrase that in the 'Mitakshara an illegitimate son and a daughter's son are on the same footing.' But this remark was made with reference to an undivided family, in a case turning on survivorship, not on inheritance. The present case is distinguishable, because here Rangan was admittedly separate, and the question is, can his grandson inherit to him. Turning to Mayne, section 520, I find that the reasons for the exclusion of a daughter's grandson (son's son) are (a) he belongs to a different family; (b) he could offer no oblation to the person whose property he would take. Now as to (a) once we get rid of the notion that the illegitimate son is *filius nullus*, and

(1) I.L.R., 1 Bom., 97 at p 115

(2) I.L.R., 7 Mad., 413.

admit that he is a son (of some kind) of his father, it is clear that the son of such a son belongs to the family of his paternal grandfather, and not to any different family. Next as to (b), though the oblation theory may not carry much weight in Madras, there is, as far as I know, no impropriety or impossibility preventing such a grandson from making oblation for his paternal grandfather. Hence in my opinion the analogy of the daughter's son is not a safe guide in the present case. I hold that the sons of Madurai and Narayana are entitled to trace to their grandfather Rangan, and to inherit his property, as against his divided brother." He reversed the decree of the lower Court and dismissed the plaintiff's suit.

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Plaintiff preferred this second appeal

Mr *Stephen Andly* and *A.D. Zaccheus* for appellants.

Mahadeva Ayyar and *Kothandarama Ayyar* for respondent

BHASHYAM AYYANGAR, J —The question and the only question which arises in this second appeal is whether, under the Mitakshara law, a divided brother of a Sudra A, who died without leaving legitimate male issue, is entitled to succeed to A's estate in preference to A's grandson, the legitimate son of A's predeceased illegitimate son. Neither side relies upon any usage or custom having the force of law and the question has to be decided as an abstract question of Hindu law. There is no direct authority either in the Hindu law texts or in judicial decisions, applicable to the case. The question, therefore, has to be answered with reference to established principles and the analogies which have heretofore prevailed in like cases.

The author of the Mitakshara defines the rights of an illegitimate son in chapter I, section XII. He lays down that a son begotten by a Sudra on a female slave can be given a share by the father's choice; but that after the death of the father leaving legitimate male issue, they must allow their illegitimate brother half a share. But if the father died without leaving legitimate male issue but leaving a daughter or daughter's son, the illegitimate son takes half a share along with the daughter or daughter's son as the case may be. But in default of a daughter or daughter's son the illegitimate son takes the whole estate.

The rights of an illegitimate son in the paternal estate when the father has died a separated householder have now been clearly defined by judicial decisions. If the father left legitimate sons, the

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illegitimate son is a co-sharer with them, the extent of his share being one-half of what it would be if he were a legitimate son, and he can enforce a partition of his share (*Thangam Pillai v. Suppa Pillai*(1) and *Karuppannan Chetti v. Bulokam Chetti*(2)) though he cannot, like a legitimate son, claim a share as against his father, during the father's lifetime, even in respect of ancestral property. If the father left a widow, daughter or daughter's son, but no legitimate male issue, the illegitimate son succeeds as a co-heir with the widow, daughter or daughter's son as the case may be, and as sole heir, in default of any other heir down to a daughter's son. It is also tolerably well established that an illegitimate son, though he may succeed as heir to his paternal and maternal estate, has no claim to inherit to collaterals (*Shome Shankar Rajendra Varere v. Rajesar Swami Jangam*(3) and *Krishnayyan v. Muttusami*(4)).

The argument chiefly urged on behalf of the appellant is that inasmuch as the illegitimate son of his divided brother predeceased the father and had no right to enforce partition as against the father, his son, the respondent, cannot claim under his father and that therefore he, the appellant, is entitled to succeed as his brother's heir and that the respondent, as the grandson by an illegitimate son, cannot claim directly as the heir of his grandfather. In support of this contention reliance is chiefly placed upon the decisions of this Court that an illegitimate son has no claim by survivorship against the undivided co-parceners of his father and therefore cannot sue them for a partition after the death of his father (*Krishnayyan v. Muttusami*(4), *Ranoji v. Kandoji*(5), *Parvathi v. Thurumalai*(6)). The effect of these decisions is that it is only when the father dies a separated householder that an illegitimate son is entitled to inherit to his separate estate, but that when the father dies an "avibhakta" (undivided from his brothers or other collaterals) he is entitled only to maintenance. The principle of these decisions is explained as follows in *Thangam Pillai v. Suppa Pillai*(1). "But these decisions proceeded on the view that he had no claim by survivorship against his father's co-parceners by *jus representationis* and that he was neither a co-heir with his father, nor a sapinda in relation to his

(1) I.L.R., 12 Mad., 401.

(2) I.L.R., 21 All., 99.

(3) I.L.R., 8 Mad., 557.

(4) I.L.R., 23 Mad., 16.

(5) I.L.R., 7 Mad., 407.

(6) I.L.R., 10 Mad., 384.

father's co-parceners." I may here refer to a subsequent decision of the Privy Council (*Raja Jogendra Bhupati Hurri Chundun Mahapatra v. Nityanund Mansingh*(1)), wherein it is distinctly laid down, following the decision of the Bombay High Court in *Sadu v. Barsa*(2) and affirming the decision of the Calcutta High Court in *Jogendo Bhuputi v. Nityanund Man Singh*(3) that though an illegitimate son acquires no right by birth, in the same way as a legitimate son, and therefore cannot claim a share as against his father, yet that on the death of the father the legitimate and illegitimate sons hold the property as members of a joint Hindu family, with right of survivorship and that on the death of either without male issue the survivor takes the entire estate. If the legitimate son dies without male issue the illegitimate son becomes entitled to the whole estate. If the illegitimate son predeceases the legitimate son, leaving male issue and the legitimate son afterwards dies without leaving male issue, the whole property will devolve by survivorship on the issue of the illegitimate son. This must be the necessary result if, as affirmed by the Privy Council, the legitimate and illegitimate sons on the death of the father, hold the family property as members of a joint family.

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This decision in no way affects the course of decisions in this Presidency, as to the rights of illegitimate sons in the separate estate of their father and inasmuch as the appellant's brother died a separated householder and the appellant claims only as his divided brother, it is unnecessary to consider whether the decisions of this Court (*Krishnayyan v. Muttusami*(4); *Ranoji v. Kandaji*(5); *Parvathi v. Thurumalai*(6)) above referred to are in any way affected and if so to what extent, by this decision of the Privy Council.

Assuming, as explained in *Thangam Pillai v. Suppa Pillai*(7), that, by reason of his illegitimacy, an illegitimate son cannot claim his father's share as against his father's co-parcener by *jus representationis*, that principle will not be applicable to a legitimate son representing his father though the father was the illegitimate son of the grandfather. If a Sudra dies, leaving a legitimate son and a grandson or great grandson by a predeceased illegitimate son, can it be contended that the legitimate son is not bound to allow

(1) L.R., 17 I.A., 128, 1 L.R., 18 Cal., 151.

(2) I.L.R., 4 Bom., 37.

(4) I.L.R., 7 Mad., 407.

(6) I.L.R., 10 Mad., 334.

(3) I.L.R., 11 Cal., 702.

(5) I.L.R., 8 Mad., 557.

(7) I.L.R., 12 Mad., 401.

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half a share to the son or grandson of his deceased illegitimate brother just as he would be if the illegitimate son did not predecease the father? If the grandson, as representing his father though not claiming under him, would be entitled as against his uncle to claim his father's share it can hardly be maintained, though his father predeceased the grandfather, that he cannot claim the grandfather's estate as against the grandfather's divided brother. An illegitimate son's right of inheritance to his father's property, or at least to a part of it, is not contingent but absolute, as in the case of a legitimate son, since if he has legitimate half-brothers or other heirs of his father down to a daughter's son, he gets a half share and in the absence of such heir, the whole estate. The Sudra's illegitimate son is therefore in a position more analogous to that of a legitimate son than to that of other relations whose right of inheritance is liable to obstruction. The principles, therefore, applicable to the succession of sons and grandsons of legitimate sons may by analogy be applied to the sons and grandsons of an illegitimate son, viz., that they should be considered capable of representing the illegitimate son and in case he dies before his father, of taking the share which would have fallen to him if he had not so died. This is the view maintained by Messrs. West and Buhler in their treatise on Hindu law (3rd edition, pages 72, 82, 83, 390) and also by Mr. Jolly in his work on Hindu law (pages 185, 186), and I fully concur in that opinion. The expression 'legitimate son' (*i.e.*, son of a wedded wife) in the text of Mitakshara which entitles an illegitimate son to a half share when there are legitimate sons, evidently, includes a grandson and great grandson and similarly the expression 'illegitimate son' (*i.e.*, a son begotten by a Sudra on a female slave) occurring in the same text, applies not only to the illegitimate son, but also to the grandson and great grandson by the illegitimate son, at any rate when they are his legitimate descendants. It may be doubtful whether the illegitimate issue of the illegitimate son can, on the principle of *jus representationis*, represent the illegitimate son, if before the inheritance opened, the latter predeceased his father. But it is unnecessary to consider that question as the respondent is the legitimate son of his father.

In my opinion, therefore, the second appeal fails and should be dismissed with costs.

BENSON, J.—I concur.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

KING-EMPEROR

v.

BALU KUPPAYAN.*

1901.
October 28

Stamp Act—Act II of 1899, s. 33—Seizure of documents under search-warrant—Document that “comes” before a Magistrate.

Complaint having been made against a person for having committed offences under sections 61(c) and 69(c) of the Stamp Act of 1899, the Magistrate issued a search warrant, under which certain documents were seized and impounded under section 33 (2) of the Act. On its being contended that his action in impounding them was illegal, because the documents did not come before him in the performance of his functions within the meaning of section 33 (1)

Held, that the word ‘comes’ is sufficiently wide to include the production of documents under a search-warrant

CASE referred to the High Court under section 438 of the Criminal Procedure Code. B was convicted by a first-class Magistrate of an offence under section 68 (c) of the Indian Stamp Act of 1899. On appeal, the conviction was reversed by the Sessions Judge who delivered the following judgment:—“The appellant has been convicted of practising or being concerned in a device to defraud the Government of its stamp revenue, and sentenced under section 68 (c) of Act II of 1899 to pay a fine of Rs. 200. It is to be observed that under section 68 (c) of Act II of 1899 it is provided that the device is ‘not specially provided for by this Act’—words which the Deputy Magistrate has overlooked. The history of the case is as follows:—The appellant is one of four stake-holders in a chit fund or association. Towards the end of November 1898, *i.e.*, more than seven months before Act II of 1899 came into force, the Collector of Madurai received from one Balasundaram Pillai (fifth prosecution witness), a subscriber to the fund, a petition stating that appellant was taking security bonds from prize-winners on paper stamped with a one-anna adhesive stamp and requesting that

* Criminal Revision Case No. 342 of 1901, referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by H. Mohanly, Sessions Judge of Madurai, in Calendar Case No. 9 of 1899

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appellant might be prosecuted. This petition was referred to the Deputy Collector, Madura Division, for enquiry and disposal. The Deputy Collector promptly referred it to the Tahsildar for inquiry and report. The Tahsildar sent a notice to appellant to appear and produce the register of printed bonds to be executed by prize-winners. The appellant objected that the revenue authorities had no power to require him to produce the register. Thereupon the Tahsildar reported the matter to the Deputy Collector who directed the Tahsildar to issue a summons to appellant under Madras Act III of 1869 to produce the documents required. The Tahsildar issued a summons, but appellant appeared without producing the register and objected that he could not be legally required to produce the register. The matter was reported to the Deputy Collector, who then summoned appellant to produce the documents. Appellant appeared and represented through a pleader that he was not legally bound to produce the register, as revenue officers are not empowered to issue summons in matters in which they are not authorized to hold inquiry. The Deputy Collector evidently considered the objection a valid one, for he reported the matter to the Collector in his letter of 26th August 1899 (exhibit E). In this letter he remarked :—‘There appears to be no provision in the Stamp Act II of 1899 authorizing revenue officers to hold an inquiry in matters affecting stamp revenue. It, therefore, appears that a revenue officer has no power to compel the production of the documents in question.’ He suggested, however, that the Collector should sanction the prosecution of appellant for an offence under section 67 (c) of Act II of 1899. Thereupon the Collector sanctioned the prosecution of appellant for offences under sections 64 (c) and 68 (c) of Act II of 1899. Complaint was made to the Deputy Magistrate, who subsequently issued search-warrants and had a number of duly stamped and insufficiently stamped documents seized. The appellant has apparently been convicted, because up to 24th January 1899—on which date Act II of 1899 was not in force—he had received 829 bonds, each being executed on a one-anna receipt stamp, whereas the proper duty on all the bonds amounts to about Rs. 887. If the receipt of each bond is an offence under section 68 (c) of Act II of 1899, then appellant has been tried and convicted of 829 offences in one trial. Now the 829 insufficiently

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stamped documents are on their face bonds, and they cannot, therefore, be regarded as a contrivance or device (*Queen-Empress v Chinnia Pavuchi*(1)) Moreover, the persons who execute insufficiently stamped documents can be called upon to pay the deficient stamp duty and a penalty or they can be prosecuted for an offence, section 61 of Act I of 1879 or section 62 of Act II of 1899 Thus the so-called 'device' in which appellant was concerned is specially provided for by the Indian Stamp Act The conviction is, therefore, reversed and the sentence set aside The fine, if levied, must be refunded." The Collector having refused to cancel what his subordinates had done, B applied to the Sessions Court under section 517 of the Code of Criminal Procedure for an order directing the return to him of the documents taken from his possession With regard to this, the letter of reference gave the following particulars :—"The Deputy Magistrate has impounded the 829 insufficiently stamped bonds and forwarded them to the Deputy Collector of Madura Division under section 38 of Act II of 1899. It appears to me that he was not justified in doing so, and I trust that the Collector will see his way to cancel all that has been done." "On that date (12th August 1901) the Public Prosecutor appeared on behalf of the Collector and contended that this Court had no jurisdiction as the Deputy Magistrate had not passed any order under section 517 of the Criminal Procedure Code. It is true that, in his judgment in Calendar Case No. 9 of 1899, the Deputy Magistrate has made no reference to section 517 of the Criminal Procedure Code, and that the order in paragraph 12 of his judgment, impounding the 829 documents and directing that they be forwarded to the Deputy Collector of Madura Division, purports to have been made under sections 33 and 38 of Act II of 1899 ; but I am doubtful whether a Criminal Court can, when an enquiry or trial has been concluded, make any order for the disposal of any property or document produced before it or in its custody, except under section 517 of the Criminal Procedure Code Section 33 of Act II of 1899 does not require a Magistrate to impound any instrument coming before him in the course of a trial, so that the Deputy Magistrate was not bound to impound the 829 documents. I submit that his order impounding the documents was

(1) I.L.R., 23 Mad., 151.

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really passed under section 517 of the Criminal Procedure Code, which says that 'the Court may make such order as it thinks fit,' but as that section is not referred to in the order I hold on the authority of *In re Anant Ramchandra Lotlikar*(1) that I cannot review the order." The Sessions Judge then referred the case to the High Court for orders.

Sivasami Ayyar for the accused.

The Public Prosecutor (Mr. *E. B. Powell*) for the Crown.

JUDGMENT.—The documents in question are, as we understand the case, in the legal custody of the Collector, having been sent to him under section 38 (2) of the Stamp Act. The Collector will have to return them to the Deputy Magistrate under section 40 (3) of the same Act. When they have been so returned the Deputy Magistrate may dispose of them under section 517, Criminal Procedure Code, and we have no doubt that he will do so without any unnecessary delay.

We have no authority to order the return of the documents to the party at this stage unless the action of the Deputy Magistrate in impounding them under section 33 (2) (a) of the Stamp Act was illegal. It is argued that the action of the Deputy Magistrate was illegal, because the documents did not come before him in the performance of his functions within the meaning of section 33 (1), but we are unable to accept this contention. The word "comes" is sufficiently wide to include the production of documents under a search-warrant issued by the Magistrate.

(1) I.L.R., 10 Bom., 197.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

KASINATHA AYYAR AND OTHERS (PETITIONER-PLAINTIFF
AND HIS REPRESENTATIVES), APPELLANTS,

1901.
October 23.
November 15.

v.

UTHUMANSA ROWTHAN AND OTHERS (COUNTER-PETITIONERS—
DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 244—Purchase of mortgaged property by mortgagee—Application by purchaser to recover possession as against defendants who held possession under prior sale based on prior mortgage—Question raised whether purchaser could recover possession without first paying defendants amount of prior mortgage—"Execution and enforcement of decree"—Appeal.

A mortgagee obtained a decree directing the sale of property in the possession of certain defendants, subject to a prior charge thereon. At the sale in execution of that decree, the mortgagee purchased the property. He now sought to recover possession of it from the defendants, the question raised being, whether, under the terms of the decree, he was entitled to be put into possession without paying the amount of the prior charge, the defendants so dispossessed being at liberty to bring a separate suit to enforce the charge:

Held, that the question thus raised between the decree-holder (purchaser) and the defendants related, within the meaning of section 244 (c) of the Civil Procedure Code, to the execution or enforcement of the decree against these defendants and an appeal lay from an order passed thereon.

Per MOORE, J.—Even if the purchaser had not been also the decree-holder he would have been a representative of a judgment-creditor.

Per BHASHYAM AYYANGAR, J.—The order was not the less an order under section 244 because it was also passed under sections 318 and 334 of the Code.

PETITION filed under sections 318 and 335 of the Code of Civil Procedure by an auction-purchaser for delivery of property purchased. Petitioner held a mortgage over the land in question, dated 8th July 1884. In 1897 he obtained a mortgage decree in Original Suit No. 308 of 1897 on the file of the District Munsif's Court of Shiyali and No. 267 of 1897 on the file of the District Munsif's Court of Kumbakónam, and purchased the land in execution of that decree. The present respondents Nos. 1 to 3 or

* Civil Miscellaneous Second Appeal No. 62 of 1900, against the order of G. F. T. Power, District Judge of Tanjore, in Civil Miscellaneous Appeal No. 635 of 1900, affirming the order of P. Narayana Chari, District Munsif of Kumbakónam, in Miscellaneous Petition No. 561 of 1900, in Original Suit No. 308 of 1897 on the file of the District Munsif of Shiyali.

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then representatives being in possession, were made parties to that suit, respondents Nos 1 and 2 being defendants Nos 12 and 13, respectively, and the father of third respondent being defendant No 16. By the terms of petitioner's decree, the respondents Nos 1, 2 and 3 were ordered to pay the amount of the mortgage, and in default the mortgaged property was to be sold, subject to a prior charge. That prior charge had been created on 25th June 1884 in favour of one Nammalwar Chetti and one Saminatha Tevan, who sold it to the respondents Nos 1, 2 and 3, or their representatives, who were duly put in possession. Petitioner now sought to oust respondents Nos 1, 2 and 3. The Munsif referring to *Venkataramasammah v Ramiah*(1) and *Ramanadham Chetti v Alkonda Pillar*(2), held that as the possession of these respondents was under the prior mortgage decree, they were entitled to retain it as against petitioner, who claimed under a subsequent sale.

Petitioner appealed to the District Judge who said —“The order of the District Munsif is, it appears to me, an order under section 318 of the Civil Procedure Code as regards the property in possession of respondents Nos 1, 2 and 3 and an order under section 335 as regards the property in possession of the fourth respondent (who is not judgment-debtor); and I think no appeal lies. It is argued that the order is one under section 244, because the auction-purchaser is also the decree-holder, but the decisions of the Allahabad High Court in *Ghulam Shabbir v Dwarika Prasad*(3) and *Sabhai v. Sri Gopal*(4) seem to me to show clearly that this is erroneous. On the merits too I think that the District Munsif's order is right. It would not be equitable to allow the purchaser to oust the persons in possession without redeeming the prior mortgage.” He dismissed the appeal.

Against that order petitioner preferred this appeal.

Shagun Ayyar for appellant.

V Krishnasami Ayyar, K Simvasa Ayyangar and T. R. Venkatarama Sastri for respondents.

MOORE, J.—Nammalwar Chetti, in whose favour a mortgage had been executed under a document, dated 25th June 1884, with respect to the properties to which the present appeal relates, brought a suit (Original Suit No 172 of 1887) on that mortgage

(1) I.L.R., 2 Mad., 108.

(3) I.L.R., 18 All., 36.

(2) I.L.R., 18 Mad., 500.

(4) I.L.R., 17 All., 222.

and having obtained a decree brought the property to sale in 1890 and purchased certain of the items of property while others were bought by Saminatha Tevan. Of the several items of property thus purchased Nos. 8 to 12 were sold by the purchasers to the brother of Uthumansa Rowthan and Ahammad Rowthan, the first and second respondents, while items 13 and 14 were sold by Nammalwar to Saminatha and by him to the father of the third respondent. The first, second and the father of the third respondent were duly put in possessions of the items of property purchased by them. In 1897 Kasinatha Ayyar, the present appellant, brought a suit (No. 267 of 1897 on the file of the District Munsif of Kumbakonam) on a mortgage document, dated the 8th July 1884, which had been executed in his favour with respect to certain of the properties entered in the mortgage-deed of the 25th June 1884 in favour of Nammalwar. The present first and second respondents were respectively the twelfth and thirteenth defendants in that suit while the father of the third respondent was the sixteenth defendant. The plaintiff (present appellant) obtained a decree in which it was directed, *inter alia*, that the present respondents Nos. 1, 2 and 3 should pay him a sum of over Rs. 1,500 and that in default of payment items 8 to 14 of the property mentioned in the mortgage document of the 25th June 1884, together with other properties should be sold subject to the prior charge of Rs. 1,500 together with interest on the land under that mortgage. The present appellant having purchased the land at the sale held in execution of the decree attempted to get possession, but was obstructed by the first, second, third and fourth respondents. He accordingly presented a petition to the District Munsif under sections 318 and 335, Civil Procedure Code. The District Munsif having dismissed his petition and the District Judge having on appeal declined to interfere, this appeal against the appellate order has been preferred here.

In his petition to the District Munsif the appellant stated that the fourth respondent was in possession of a thatched house which belonged to the defendants Nos. 1 to 7 in Original Suit No. 267 of 1897, but which the fourth respondent was living in under a right obtained from them. It was alleged that these defendants had instigated the fourth respondent to prevent the appellant getting possession of the house. The fourth respondent did not appear before the District Munsif and the question as to the house which

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he is in possession of is not alluded to in his order. The District Judge held that the order relating to him must be considered to have been passed under section 335, Civil Procedure Code, and that there was consequently no appeal against that order. The District Judge appears to be right. The fourth respondent claims under an alienation made by the defendants Nos. 1 to 7 in Original Suit No. 267 of 1897 after the date of the decree in that suit. As this respondent is not a judgment debtor and as it has not been shown that he has resisted the attempt of the appellant to get possession on behalf of any one of the judgment-debtors, it must be held that his case comes under section 335 of the Civil Procedure Code and that there was consequently no appeal against the order of the District Munsif in so far as it related to him.

The District Judge has further held that there is no appeal against the order of the District Munsif in so far as it affects respondents Nos. 1, 2 and 3. I cannot uphold this decision. Even if the plaintiff, the purchaser of the lands, were not the decree-holder, I am decidedly of opinion that, following the decisions in *Prosunno Coomar Sanyal v. Kasi Das Sanyal*(1), *Ishan Chunder Sirkar v. Beni Madhub Sirkar*(2) and *Dwar Buksh Sirkar v. Fatik Jali*(3), he must be held to be a representative of the judgment-creditor. In the present case the purchaser is the decree-holder, the plaintiff in the suit. It would be impossible to hold that having been a party to the decree, he ceased to be a party because he purchased the property at the sale held in execution. The only point therefore to be decided is whether the question as to which the parties to the present proceedings are at issue is one relating to the execution, discharge or satisfaction of the decree (section 244, Civil Procedure Code). The present application being one by the purchaser of the lands to be put in possession must be held to be a step in aid of execution (vide *Moti Lal v. Makund Singh*(4), *Sariatoolu Molla v. Raj Kumar Roy*(5), and *Lakshmanan Chettiar v. Kannammal*(6)) and such being the case the question at issue is clearly one relating to the execution of the decree and, as has already been pointed out, it is between the parties to the decree. The order of the District Munsif was

(1) L.R., 19 I.A., 166; I.L.R., 19 Calc., 683.

(3) I.L.R., 26 Calc., 250.

(5) I.L.R., 27 Calc., 709.

(2) I.L.R., 24 Calc., 62.

(4) I.L.R., 19 All., 477.

(6) I.L.R., 24 Mad., 185.

therefore one passed under section 244, Civil Procedure Code, and an appeal lay from it.

On the merits I agree with the District Judge. The direction in the decree in Original Suit No. 308 of 1897 was that the property should be sold subject to the prior charge on it of the amount due under the mortgage document of the 25th June 1884. It follows that the respondents Nos. 1, 2 and 3 cannot be ousted till the total amount due under that document is paid off. This second appeal is dismissed with costs.

BHASHYAM AYYANGAR, J.—I am also of the same opinion. The decree-holder in execution of his decree which directed the sale of certain properties (mortgaged to him by defendants Nos. 1 and 3 and the ancestors of defendants Nos. 2, 4, 5, 6 and 7) subject to a prior charge thereon of Rs. 1,500 (together with interest) in favour of the twelfth, thirteenth and sixteenth defendants, became the purchaser and now seeks to recover possession of the properties purchased under sections 318 and 334, Civil Procedure Code, from the twelfth and thirteenth defendants and the legal representatives of the sixteenth defendant. The question that is raised is whether, under the terms of the decree, he is entitled to be put into possession without paying the amount of the prior charge, the defendants dispossessed being left at liberty to bring a separate suit for enforcing the charge in their favour. In my opinion the question thus raised between the decree-holder-purchaser and the said defendants relates, within the meaning of section 244 (c), Civil Procedure Code, to the execution or enforcement of the decree against those defendants and the order appealed against is not the less an order under section 244, because it is also passed under sections 318 and 334 neither of which is specified in section 588.

I am clearly of opinion that, according to the right construction of the decree, the decree-holder-purchaser cannot execute or enforce the decree against the defendants in possession by ousting them without redeeming the prior charge.

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APPELLATE CRIMINAL.

*Before Mr. Justice Benson and Mr. Justice Moore.*1901.
November 25.

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v.

KRISHNAYYA.*

Criminal Procedure Code—Act V of 1898, s. 421—Summary dismissal of appeal—Judgment.

A Court, when dismissing an appeal summarily under section 421 of the Code of Criminal Procedure, is not bound to write a judgment in conformity with the provisions of section 367.

JUDGMENTS in two criminal appeals referred to the High Court under section 438 of the Code of Criminal Procedure as not being such as are required by section 367 of that Code. The judgments were in the following terms:—"After perusing the judgment and petition of appeal, I see no reason for interfering with the decision of the lower Court and reject the appeal summarily under section 421, Code of Criminal Procedure." The Acting Sessions Judge referred the judgments to the High Court.

The parties were not represented.

JUDGMENT.—The Sessions Judge will be informed that there is nothing in the Code of Criminal Procedure which requires a Court, when dismissing an appeal summarily under section 421 of that Code to write a judgment in conformity with the provisions of section 367. This has been so decided by all the High Courts, by this Court in *Proceedings of the Madras High Court, dated 18th April 1883*(1), and by the other High Courts in the cases of *Rash Behari Das v. Balgopal Singh*(2), *Queen-Empress v. Warubai*(3) and *Queen-Empress v. Nannhu*(4).

In the last-mentioned case the Full Bench decided that it was advisable for the Court to state its reasons in view of the possibility of a petition for revision.

There is nothing in Rule No. 7 of the rules printed at pages 167 to 175, Criminal Rules of Practice, 1896, in conflict with the

* Criminal Revision Case No. 406 of 1901, referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by J. H. Munro, Acting Sessions Judge of Kistna, in Criminal Appeals Nos. 46 and 47 of 1901.

(1) Weir's Cr. Rul., p. 1009.

(2) I.L.R., 21 Calc., 92.

(3) I.L.R., 20 Bom., 540.

(4) I.L.R., 17 All., 241.

above decisions. The meaning of that rule is that, in all cases other than those dealt with under section 421, Criminal Procedure Code, the reasons for the decision should be given. The rule as originally passed required such reasons only in cases where the judgment appealed against was modified or reversed, but it was pointed out that this was opposed to section 367 of the Code and the rule was then amended in its present form.

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v.
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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

SAMBASIVA AYYAR (PLAINTIFF),

v.

1901.
November 25.

VYDINADASAMI AND OTHERS (DEFENDANTS—PURCHASERS).*

Civil Procedure Code—Act XIV of 1882, s. 307—Default of purchaser at Court-sale to pay full amount—Forfeiture.

Section 307 of the Code of Civil Procedure is imperative and must be given effect to.

Where a purchaser at a Court-sale makes default in paying the full amount of the purchase money, the deposit must be forfeited. The fact that the decree-holder and the judgment-debtor do not ask for a re-sale, but consent to the original sale being allowed to stand, is no reason why the Government should forego the forfeiture.

CASE referred under section 617 of the Code of Civil Procedure. The facts are contained in the following letter of reference :—"In execution of the decree in Original Suit No. 69 of 1900 on my Court file, certain immoveable property advertised for sale was purchased at such sale on the 23rd November 1900 by a third party for Rs. 1,415. The purchaser at once deposited 25 per cent. of the purchase money, i.e., Rs. 354, and going to his village fell ill and failing to deposit the balance within the time allowed by section 307 of the Code of Civil Procedure, appeared on 14th December with such balance and petitioned to be allowed to deposit the same in Court. Neither the decree-holder nor the debtor applied for a fresh sale and as the purchaser's case was a

* Referred Case No. 8 of 1901, referred for the orders of the High Court under section 617 of the Civil Procedure Code, by P. Narayana Chariar, District Munsif of Kumbakonam, in Original Suit No. 69 of 1900.

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SAMI.

hard one, I allowed him to deposit the balance to enable him to appeal against my refusal to take him to have paid the purchase money in time. He did not appeal against that order, but has now put in a petition under section 312 of the Code of Civil Procedure to confirm the sale, adding that the decree-holder and the debtor have no objection to have the sale confirmed to him. These latter appeared to notices issued and consent in writing to the confirmation of sale. The point now referred for orders is whether under sections 307 and 308 of the Code of Civil Procedure, on a default by the purchaser to deposit the balance of purchase money within 15 days of sale, forfeiture of the money deposited on the date of sale to Government is peremptory and must necessarily take place. Here the parties interested in getting a re-sale of the property are not for such a re-sale. In *Sonaya v. Kalamegham*(1), a case under a similar section of the Land Revenue Act (section 36), their Lordships have held that Government may give time to a purchaser beyond the time fixed by law to pay the balance of purchase money and that it is not obligatory on the part of Government to forfeit the deposit and re-sell the land. No doubt, it may be said that in a revenue sale the Government is one of the two interested parties in re-sale and that in the present case the parties interested in re-sale (*i.e.*, decree-holder and debtor), may have nothing to lose by a re-sale. The matter is not free from doubt. The purchaser has deposited the balance within seven days of the time he was to do so. The parties interested in re-sale are not for such a re-sale and consent for confirmation of sale to the present purchaser. The only party to gain by an order for re-sale is the State, which gets the deposit amount of Rs. 354 by forfeit. The sole point is whether the Government should in every case of default, insist of the forfeit. As it is a very hard case for the purchaser to lose such a big amount, as the matter is not free from doubt and as the point is of considerable importance, I have made the reference."

Panchapagesa Sastri for the auction-purchaser.

Plaintiff and defendant No 1 were not represented.

JUDGMENT.—The words of the section 307 of the Code of Civil Procedure are clear and imperative, and must be given effect to.

(1) I L R., 5 Mad, 130.

The fact that the decree-holder and the judgment-debtor do not ask for a re-sale but consent to the original sale being allowed to stand, is no reason why the Government should forego the forfeiture. The forfeiture is imposed by the Code in order to prevent waste of the Court's time in conducting re-sales in consequence of defaults like the present

There was nothing, we may add, so far as appears, to have prevented the purchaser from sending the money to the Court within time even if he was unable to attend in person.

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ATTYAR
v.
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SAMI.

APPELLATE CIVIL.

Before Mr Justice Benson and Mr. Justice Bhashyam Ayyangar.

APPA RAO AND ANOTHER (PETITIONERS NOS. 1 AND 2—PLAINTIFFS
NOS. 1 AND 2), APPELLANTS,

1901.
December 3.

v.

KRISHNA AYYANGAR AND ANOTHER (COUNTER-PETITIONERS—
DEFENDANTS NOS. 3 AND 4), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 244—Execution of decree passed on usufructuary mortgage—Continuation of possession by mortgagees subsequently to decree—Claim to set off profits thus accrued from decree amount—Application for order absolute—Transfer of Property Act—Act IV of 1882, s. 89.

By a decree passed on a compromise in a suit for the amount due under a mortgage, defendants were ordered to pay Rs. 770 to plaintiffs within a year, and in default of payment the amount was to be recovered by sale of the mortgaged and other property. By the terms of the mortgage, possession was given in lieu of interest, but the decree was silent as to possession and interest. Upon an application being made for execution of the decree by sale of the property referred to in it, the District Judge held that if the petitioners had continued in possession of the mortgaged property ever since the date of the decree, it would be necessary to take an account to ascertain whether the decree had been satisfied, and dismissed the petition.

Held, that such an order was wrong, inasmuch as it went behind the decree instead of executing it.

* Civil Miscellaneous Second Appeal No. 25 of 1901, against the order of L. C. Miller, Acting District Judge of Salem, in Appeal Suit No 251 of 1899, reversing the order of C. V. Visvanatha Sastri, District Munsif of Namakkal, in Execution Petition No. 770 of 1899 in Original Suit No. 298 of 1892.

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Held also, that the application, in which the decree-holder stated that there had been default in payment of the decree amount and applied for sale, was an application for an order absolute for sale.

APPLICATION for execution. The decree which petitioner now sought to execute had been passed in terms of a compromise in a suit on an usufructuary mortgage. By the terms of the decree, the defendants were to pay to plaintiffs Rs. 770 within one year from its date, and in default plaintiffs were to recover the amount by sale of the mortgaged and other property. The petition for execution prayed that the property referred to in the decree might be brought to sale. Defendants Nos. 1 and 2 did not oppose the application. Defendants Nos. 3 and 4 had sued to have the compromise set aside, but without success. They now raised objections to execution being proceeded with. The Munsif held that they were not entitled to impeach the decree and ordered proclamation to issue. Defendants Nos. 3 and 4 appealed to the District Judge, who reversed the Munsif's order. He said:—"The Munsif was right in refusing to allow the petitioner to contest the decree; but he does not appear to have considered the question raised on the petition that the decree has been satisfied by the occupation of the land by the mortgagees. The mortgage allowed possession in lieu of interest, but the *razinama* and the decree thereon superseded the document and regulated the rights of the parties from the date of the decree. The decree is silent as to possession and as to interest: it merely requires defendants to pay Rs. 770 within a year, and makes the amount recoverable, in the event of default, by sale of the property mortgaged and other ancestral property of the defendants. I am asked for the respondents to infer from the silence of the decree the fact that it was not intended to supersede that provision of the mortgage-deed by which the mortgagees enjoyed possession in lieu of interest. It seems to me that to decide this point would be to go beyond the province of an execution Court. All that the Court can do is to see that the plaintiffs get the sum of Rs. 770 and expenses as decreed to them. If, then, they have been enjoying possession of the property ever since the decree, it is necessary to take an account to ascertain whether the decree has been satisfied. Another question raised is whether, the decree being one for sale, an order absolute is not necessary. I think it is necessary. The decree is not in the form prescribed in the Transfer of Property Act for a

decree for sale, but in effect it is the same : it declares that if the money is not paid within a fixed period the property is to be sold : evidently a further order is required after the fixed period has expired." He dismissed the application.

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v.
KRISHNA
AYYANGAR.

Plaintiffs Nos. 1 and 2 preferred this appeal.

Sivasami Ayyar for appellants.

Sundara Ayyar for respondents.

JUDGMENT—The order of the District Judge cannot be sustained. He is in error in holding that an account of the profits of the land should now be taken for the purpose of being set off against the amount decreed. This is going behind the decree instead of executing it as it stands. The District Judge is also wrong in holding that the present application cannot be granted in the absence of a prior order absolute for sale. It is stated by the appellant that such an order for sale was passed on the 13th December 1897, but whether that is so or not, the present application, in which the decree-holder states that there has been default in payment of the decree amount and applies for sale, is in our opinion an application for an order absolute for sale.

The respondent raises before us several objections by way of limitation and otherwise, to the grant of the application, but these are not matters which we need decide at this stage.

We allow the second appeal, with costs, and remand the appeal to the District Judge for disposal according to law

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Moore.

1901.
December 3.

PAMU SANYASI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v

ZAMINDAR OF JAYAPUR (DEFENDANT), RESPONDENT *

Provincial Small Cause Courts Act—Act IX of 1887, s 15, sched II, cl. 35 (j)—Compensation for illegal distress—Civil Procedure Code—Act XIV of 1882, s 586—Second appeal—Limitation—Rent Recovery Act (Madras)—Act VIII of 1865, s 78—Cause of action complete on date of illegal distress

A plaint alleged that plaintiffs had for long cultivated certain land as tenants under defendant, that they had raised a crop of paddy measuring about 6 garces and stored it in three heaps on the land, that one of the plaintiffs had paid all the cist that was due to defendant, but that defendant had taken unlawful possession of two of the heaps of paddy measuring about 5 garces under the pretext that he had distrained them. The prayer was for an order directing defendant to deliver to plaintiffs about 5 garces of grain worth Rs. 250 at Rs 50 per garce in respect of the two heaps of paddy of which he had taken unlawful possession. The distraint was made on 25th January 1898, and the suit was instituted on 26th July of the same year.

Held, that the suit was in substance one for compensation for illegal distress or attachment and not for the recovery of specific property, and that, in consequence, it was not a suit of the nature cognizable by a Court of Small Causes, and a second appeal lay.

Held also, that the suit was barred. The wrong was complete and the cause of action arose when the unlawful distress was made.

Yamuna Bai Rani Sahiba v Solayya Karundan, (I.L.R., 24 Mad, 339), distinguished.

Suit for compensation for illegal distress or attachment. The plaint was as follows:—"The plaintiffs have been as raiyats for about thirty years, since their father's lifetime, cultivating the jirayati land assessed at Rs. 92-13-0 a year inclusive of cesses, at Nimmalova village attached to Madugula zamindari included in the mortgage with possession to the plaintiffs. The plaintiffs as usual cultivated the said lands in the year 1897, raised paddy measuring about 6 garces and divided it into three heaps on the said land.

* Second Appeal No 9 of 1900 against the decree of M. D. Bell, District Judge of Vizagapatam, in Appeal Suit No 150 of 1899, affirming the decree of P. Lakshminarasu Pantulu District Munsif of Chodavaram, in Original Suit No. 538 of 1898.

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The first plaintiff paid Rs 92-13-0, the amount of cist including land cesses, due to the defendant by the plaintiffs for the year 1897. Although no arrears of any kind were due to the defendant in respect of the said land, he, without giving any notice of demand to the plaintiffs, unlawfully took possession in February 1898, of two heaps of paddy measuring about 5 garces out of the said three heaps belonging to the plaintiffs, saying that he had attached the same. The defendant has no manner of right to make attachment or to take unlawful possession as above. The cause of action arose at Nimmalova in February 1898 when the defendant took unlawful possession of the heaps of paddy belonging to the plaintiffs, on the pretext of having attached them. The plaintiffs therefore pray for a judgment directing the defendant to deliver to the plaintiffs about 5 garces of grain worth Rs. 250 at Rs. 50 per garce in respect of the two heaps of paddy which the defendant took unlawful possession of, alleging that he had attached the same, and which the plaintiffs had raised in the year 1897 on the jirayat lands included in the cowls of Mushimmanupolam at Nimmalova village, together with straw worth about Rs. 50 or directing the defendant to pay to the plaintiffs Rs 300 being the value of the said grain and the straw, and also directing the defendant to pay to the plaintiffs their costs, and granting such other reliefs as the Court may deem to be reasonable and suitable."

Defendant denied having distrained any immoveable property of plaintiffs and contended that second plaintiff had wrongly sold his rights as tenant, that the land so sold had been put up to auction on 21st April 1897, and purchased by a person who failed to pay the cist due to defendant, and that in consequence the crop raised on his land had been distrained on 25th January 1898 and eventually sold for Rs. 78. Limitation was also pleaded. The Munsif found that the distraint had been made on 25th January 1898, and that the suit should have been instituted, under section 78 of the Rent Recovery Act, at the latest on 25th July 1898, whereas it had, in fact, been instituted on 26th July 1898. He held that the suit was barred by limitation and dismissed it. Plaintiffs appealed to the District Judge who upheld the finding and dismissed the appeal.

Plaintiffs preferred this second appeal.

Seshagiri Ayyar for appellants.

Tiruvenkatachariar for respondents.

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v
ZAMINDAR OF
JAYAPUR.

JUDGMENT.—A preliminary objection has been taken that no appeal lies in this case since the suit is of the nature cognizable in a Court of Small Causes. The way in which the plaint is drawn shows that the suit is in substance a suit for compensation for illegal distress or attachment and not a suit for the recovery of specific property. The case relied on in support of the preliminary objection (*Chakradharudu v. Venkataramayya*(1)) is clearly distinguishable. In that case certain attachments had been set aside by the Revenue Court and the Revenue Court had ordered that these properties should be restored. The properties were not restored and a suit was brought to enforce their restoration. In that case no question of illegal distress was involved. The preliminary objection must be overruled. We are of opinion that the suit is time barred. The District Munsif finds that the distraint was made on 25th January. The plaintiff's cause of action arose when the distraint was made. In *Yamuna Bai Ram Sahaba v. Solayya Kavundan*(2) where the Court held the suit was not time barred on the ground that the detention was a continuing wrong, the property was detained after the attachment had been set aside. It was this detention which the Court held was a continuing wrong. A state of things in which a party does not restore to its owner property which has been released from attachment may be said to constitute a continuing wrong as against the owner of the property. This case seems to us to be distinguishable on the facts from the case now before us.

In the case before us the wrong was complete when the unlawful distress was made.

We think the Courts below were right in holding that the suit is time barred.

The second appeal is dismissed with costs.

(1) I.L.R., 22 Mad., 457.

(2) I.L.R., 24 Mad., 339.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhaslyam Ayyangar.

AROGYA UDAYAN (PLAINTIFF), APPELLANT,

v.

APPACHI ROWTHAN AND OTHERS (DEFENDANTS,

Nos. 1 AND 3 TO 7), RESPONDENTS.*

1901.
December 3.

Court Fees Act—Act VII of 1870, s. 8—Valuation of suit—Suit for an account—Petition to increase valuation after finding by Commissioner—Increase to an amount exceeding Court's jurisdiction—Return of plaint for presentation to proper Court—Material irregularity

In a suit for an account the usual valuation for purposes of Court fees was made in the plaint, which was filed and received in a Munsif's Court. The Munsif appointed a Commissioner to take an account and the result was that plaintiff was found by the Commissioner to be entitled to a much larger sum. Plaintiff then applied for leave to amend the plaint, which was granted, and the valuation of the suit was accordingly increased. As the amount claimed in the amended plaint was greater than that over which the Court of a Munsif ordinarily has jurisdiction, the Munsif ordered the plaint to be returned for presentation to the proper Court.

Held, that the Munsif had acted with material irregularity in permitting the valuation of the suit to be revised and that he ought to have tried the case.

PETITION to revise the order of a District Munsif returning a plaint for presentation to the proper Court. The suit in which the plaint had been presented was for the taking of partnership accounts and for the recovery of Rs. 1,400, which plaintiff estimated as the approximate amount of profits which would fall to his share when the account should be taken. Paragraph 6 of the plaint stated that if it should be found that a greater sum was due to plaintiff, he was prepared to pay Court fees on the excess. The plaint was duly filed and the Munsif passed a preliminary decree directing defendants to produce all the accounts in their possession and appointing a Commissioner to take an account. The Commissioner, in due course, reported that the amount due to

* Civil Miscellaneous Appeal No. 26 of 1901 against the order of T. M. Rangachari, Subordinate Judge of Madura (West), in Original Suit No. 22 of 1899, and Civil Revision Petition No. 45 of 1901, under section 622 of the Civil Procedure Code, praying the High Court to revise the order of T. Sadasiva Ayyar, District Munsif of Dindigul, in Civil Miscellaneous Petition No. 293 of 1899 in Original Suit No. 1061 of 1896.

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plaintiff was Rs. 8,000. Plaintiff then filed a petition for amendment of the plaint accordingly and the amendment was made. The Munsif considered that the suit for the larger amount was beyond his jurisdiction and returned the plaint for presentation to the proper Court. Plaintiff then presented the plaint at the Court of the Subordinate Judge who held that the Munsif's jurisdiction had not been ousted and returned the plaint.

Plaintiff preferred an appeal against the order of the Subordinate Judge and also preferred this civil revision petition against the order of the District Munsif.

Sivasami Ayyar for appellant and petitioner.

Sundara Ayyar for respondents.

JUDGMENT.—This is a suit for an account and in such a suit the valuation for purposes of Court fees and jurisdiction does not disentitle the plaintiff to recover in the suit such higher amount as the evidence may show he is entitled to. The only restriction is that he cannot execute the decree without paying such additional Court fee as may be due on the amount decreed. The valuation of the suit in the present case was made by the plaintiff in the *bonâ fide* belief that his valuation was correct, and in law, that valuation determined the grade of Court which had jurisdiction to entertain and try the suit. The valuation made indicated the District Munsif's Court as the proper Court and the District Munsif was therefore legally seized of the case. A revision of that valuation by the plaintiff cannot be permitted so as to oust the jurisdiction of such Court. In the present case the revision of the valuation had that effect, and the District Munsif returned the plaint and it was presented to the Subordinate Judge's Court. Such a revision was unnecessary in the interest of the plaintiff, as already stated by us, and the District Munsif acted with material irregularity in permitting it. In our opinion the Subordinate Judge took a correct view of the law in refusing to receive the amended plaint on the ground that the jurisdiction continued in the District Munsif and that he ought to try the suit. We may add that to hold otherwise would lead to objectionable consequences in that it would enable a plaintiff by merely altering the valuation to get his suit transferred even at a late stage (as in this very case) from the Court in which it was rightly instituted to another Court in which he might think he had a better chance of success. We allow the revision petition and

dismiss the appeal. We set aside the order of the District Munsif permitting the amendment of the plaint, direct him to receive the plaint, strike out the amendment and resume the trial of the suit under its original number. Plaintiff must pay the costs of respondents in the appeal and revision petition in this Court.

AROGYA
UDAYAN
v
APPACHI
ROWTHAN.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

KRISHNAMA CHARIAR (COUNTER-PETITIONER—
PLAINTIFF No. 2), APPELLANT,

1901.
December 3.

v

APPASAMI MUDALIAR AND ANOTHER (PETITIONERS—
TRANFEREE-PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 244—Determination of question whether party applying for execution is representative of decree holder—Appeal.

The effect of the last clause of section 244 of the Code of Civil Procedure is to give the right of appeal against an order determining whether a party applying for execution is or is not the representative of the decree-holder

APPLICATION for execution. The appellant, a trustee, was plaintiff in a suit in which the decree sought to be executed was passed. The respondents, as successors of the appellant in the office of trustee, from which he was alleged to have been suspended, applied to the District Munsif under section 232 of the Code of Civil Procedure for execution of the decree as transferees thereof. The District Munsif allowed execution, from which the ex-trustee appealed. A preliminary objection being taken by the transferees that no appeal lay from an order passed under section 232 of the Code of Civil Procedure, the District Judge dismissed the appeal, holding that there was no appeal, following *Sambasiva v. Srinivasa*(1).

The ex-trustee (plaintiff No. 2) preferred this second appeal.

V. Krishnasami Ayyar for appellant.

The respondents were not represented.

* Civil Miscellaneous Second Appeal No 32 of 1901 against the order of K. C. Manavedan Raja, District Judge of North Arcot, in Civil Miscellaneous Appeal No 13 of 1900, affirming the order of T. S. Krishna Ayyar, Acting District Munsif of Sholinghur, in Miscellaneous Petition No. 1494 of 1900 in Original Suit No. 353 of 1888

(1) I.L.R., 12 Mad., 511

KRISHNAMA
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v.
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MUDALIAR.

JUDGMENT.—The decision in *Sambasiva v. Srinivasa*(1) by which the District Judge considered himself bound was not passed with reference to the last clause of section 244 of the Civil Procedure Code, which clause was added by Act VII of 1888. The effect of the amendment was considered in *Manikkam v. Tatayya*(2) and the decision in *Badri Narain v. Jai Kishen Das*(3) was referred to with approval as deciding the question. We are of opinion that the effect of the amendment is to give the right of appeal against an order determining whether a party applying for execution is or is not the representative of the decree-holder.

We allow this second appeal with costs and remand the appeal to the District Judge for disposal according to law.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Moore.

1901.
November 22.

KING-EMPEROR

v.

ALAGARISAMI PATILAN AND ANOTHER (ACCUSED).*

Criminal Procedure Code—Act V of 1898, s. 202—Failure to “record reasons” for postponing issue of process and inquiring into case—Irregularity

By section 202 of the Criminal Procedure Code, if a Magistrate is not satisfied as to the truth of an offence he may, when the complainant has been examined, “record his reasons, and may then postpone the issue of process” and inquire into the case.

Held, that the failure on the part of a Magistrate to record his reasons is at most an irregularity, and unless it in fact occasions a failure of justice is not a ground for setting aside his order.

PETITION to revise an order of a Sessions Court. The order was as follows :—“This is an application to set aside the order, dated 25th May 1901, of the Second-class Magistrate of Madura Town, dismissing petitioner’s complaint. The complaint was presented on 10th April 1901, and on that day, complainant was examined on oath

(1) I.L.R., 12 Mad., 511.

(2) I.L.R., 21 Mad., 388 at p. 390.

(3) I.L.R., 16 All., 483

* Criminal Revision Case No. 367 of 1901, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of H. Moberly, Sessions Judge of Madura, in Criminal Revision Petition No. 33 of 1901, setting aside the order of A. B. Rajagopala Chettiar, Second-class Magistrate, Madura, in Calendar Case No. 280 of 1901.

as required by Criminal Procedure Code, section 200. Thereupon the Sub-Magistrate passed the following order:—'Section 406, Indian Penal Code, preliminary inquiry. Notice to first accused.' On the 22nd April some inquiry was made and the Magistrate ordered certain summons to be issued. On the 25th May he dismissed the complaint and, three days later, recorded the following extraordinary order:—'I distrusted the truth of the complaint as there was a case of assault preferred by one of the accused pending against the complainant. I resolved, therefore, to make a preliminary inquiry under section 202, Criminal Procedure Code. The reason should have been recorded before the preliminary enquiry began. As it was not done then I do it now and utilize the information got in the enquiry made already, so that it may not be said that the reason not having been recorded the dismissal under Criminal Procedure Code, section 203, is not valid.' Section 202 of the Criminal Procedure Code authorises a Magistrate of the first or second class, if he is not satisfied as to the truth of a complaint to postpone the issue of process against the accused and to enquire into the case only if he has recorded his reasons for distrusting the truth of the complaint. The words 'may then postpone the issue of process, &c,' show that unless and until reasons are recorded the issue of process may not be postponed and no local inquiry may be made. An inquiry made without reasons for distrusting the truth of the complaint is illegal, and manifestly it cannot be made legal by the Magistrate making certain remarks after he has dismissed the complaint. The preliminary inquiry made by the Magistrate was illegal, for he issued process to one of the accused. In my opinion section 537 (a) of the Criminal Procedure Code does not apply to this case, for the inquiry made by the Magistrate was not an inquiry under the Criminal Procedure Code, but an inquiry distinctly prohibited by the Criminal Procedure Code. If the Magistrate had recorded his reasons for distrusting the truth of the complaint and then made an inquiry, any error, omission or irregularity in the inquiry would have been saved by Criminal Procedure Code, section 537 (a); but here the inquiry is illegal *ab initio*. If a Magistrate, not being empowered by law in this behalf, tries an offender or decides an appeal, his proceedings are void. In the present case the Magistrate made an inquiry which he was not empowered to make, and he was manifestly not acting in good faith. It appears to me that his proceedings are void. If I am wrong in this view, it is certain that the Magistrate has acted on

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documentary evidence, which should not have been admitted as the documents had not been proved. For these reasons I set aside the Sub-Magistrate's order and direct the present Sub-Magistrate to make further inquiry into the complaint." The case was heard by a Sub-Magistrate who held it to be a false case and dismissed it under section 203 of the Code of Criminal Procedure.

The accused preferred this criminal revision petition to the High Court against the order of the Sessions Judge.

T. Rangachariar for the accused

The Public Prosecutor (*Mr. E. B. Powell*) for the Crown.

JUDGMENT.—This Court has, in its order in the case of *Venkatesulu Naidu v. Durvasu Rangayyan*(1) pointed out to the learned Sessions Judge that his reading of section 202, Criminal Procedure Code, is incorrect. The Magistrate had jurisdiction to act under section 202 and his failure to record his reasons was at most an irregularity, and unless it, in fact, occasioned a failure of justice it could be no ground for setting aside his order. The Sessions Judge does not suggest that the order was wrong on the merits and we see no reason to hold that it was so.

We set aside the order of the Sessions Judge, dated 5th September 1901

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, Mr. Justice Davies and Mr. Justice Moore.

1901
September
2, 3.

NARAYANASAMI REDDI (DEFENDANT), APPELLANT,

v

OSURU REDDI (PLAINTIFF), RESPONDENT.*

Letters Patent, Art 15—"Judgment"—Revision petition against decree in small cause suit—Difference of opinion—Appeal—Civil Procedure Code—Act XIV of 1882, s 575—Contract Act—Act IX of 1872, s 72—Right to recover money had and received to plaintiff's use unaffected by section 72

The plaintiff in a small cause suit having obtained a decree, the defendant filed a civil revision petition in the High Court. At the hearing by a Bench, one

(1) Criminal Revision Case No 263 of 1901, (unreported).

* Appeals Nos 1 and 2 of 1900, under section 15 of the Letters Patent, against the judgment of Mr. Justice Boddam, in Civil Revision Petitions Nos. 59 and 60 of 1899 preferred under section 25 of the Provincial Small Cause Courts Act, to revise the decrees of A. Kuppusami Ayyangar, District Munsif of Sholinghur, in Small Cause Suits Nos. 689 and 690 of 1898.

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learned Judge expressed the opinion that the case should be remanded for disposal according to law after further evidence had been taken, whilst the other held that the case was not one with which the High Court should interfere. The defendant then preferred an appeal under article 15 of the Letters Patent when a preliminary objection was taken to the hearing of the appeal, on the ground that there had been no judgment within the meaning of the article.

Held, that the adjudication by the Bench was a judgment within the meaning of article 15 of the Letters Patent.

Held also, that the case was governed by section 575 of the Code of Civil Procedure, and not by article 36 of the Letters Patent.

Defendant had sought to exercise, as against plaintiff, the special powers conferred upon landholders by section 38 of the Rent Recovery Act. In fact, the relations between defendant and plaintiff were not such as entitled defendant to exercise those powers. Plaintiff, in order to avert the injury which he would have sustained if his interest in the land had been sold, paid the amount demanded by the defendant, and now sued to recover from the defendant the sum so paid.

Held, that plaintiff was entitled to recover the money paid by him as money had and received by defendant to the use of the plaintiff.

Section 72 of the Contract Act in no way affects the principle of law that where a defendant has received money which in justice and equity belongs to a plaintiff, under circumstances which render a receipt of it a receipt by the defendant to the use of the plaintiff, the plaintiff is entitled to recover.

Jugdeo Naram Singh v Raja Singh, (I L.R., 15 Cal., 656), approved.

APPEAL, under article 15 of the Letters Patent, from the judgment passed in a civil revision petition. The petition was to revise the decree of a District Munsif in a small cause suit. Petitioner had been defendant in a suit brought against him by respondent, wherein respondent (plaintiff) sought to recover a sum of money which, he contended, petitioner (defendant) had illegally collected as rent from him. The Munsif held that petitioner (defendant) was not a landlord under the Rent Recovery Act, that the payment by respondent (plaintiff) to him had been made under protest; and that respondent (plaintiff) was entitled to the refund which he claimed.

The defendant in the suit then filed a revision petition. The case first came on for hearing before SUBRAHMANIA AYYAR and BODDAM, JJ., when the former learned Judge was of opinion that the decree should be set aside and the suit remanded for disposal according to law, after further evidence had been taken; and the latter, that the case was not one in which the High Court should interfere by way of revision, as the defence set up by the petitioner (defendant) in the High Court had not been raised in the Court of

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First Instance. As a result of this difference of opinion the decree of the Munsif stood.

Defendant now preferred this appeal, under article 15 of the Letters Patent.

T. Rangachariar, for respondents, took the preliminary objection that no appeal lay, as there was no judgment within the meaning of article 15 of the Letters Patent. He referred to *Sriramulu v. Ramasam*(1) and *Poona City Municipality v. Ramji*(2).

The objection was overruled

V. C. Desikachariar, for appellants, contended that the case was governed by article 36 of the Letters Patent and not by sections 575 and 647 of the Code of Civil Procedure, and that the opinion of Mr Justice Subrahmania Ayyar should prevail. He cited *Husain Begam v. The Collector of Muzaffarnagar*(3); *Appaji Bhurjar v. Shivalal Khubchand*(4); *Sri Gridharaj Maharaj Tickant v. Purushottam Gossami*(5); and *Kunhunn v. Srivallabhan*(6). He argued that as the money had been voluntarily paid, though under protest, it need not be refunded. He referred to sections 15 and 72 of the Indian Contract Act.

T. Rangachariar, for respondent, was stopped.

JUDGMENT.—This suit was tried by the District Munsif as a small cause suit and judgment was given for the plaintiff. On an application to this Court to reverse the District Munsif's decree, Subrahmania Ayyar, J., was of opinion that the decree should be set aside and the suit remanded for disposal according to law after further evidence had been taken. Boddam, J., was of opinion that the case was not one in which this Court ought to interfere by way of revision upon the ground that the defence set up by the defendant in this Court had not been raised in the Court of First Instance and that the petition ought to be dismissed.

The defendant appealed under article 15 of the Letters Patent. A preliminary objection was taken by the plaintiff to the hearing of the appeal that there had been no judgment within the meaning of article 15. We are of opinion that the adjudication by Sub-

(1) I.L.R., 22 Mad., 109.

(2) I.L.R., 21 Bom., 250.

(3) I.L.R., 11 All., 176 at p. 178

(4) I.L.R., 3 Bom., 204.

(5) I.L.R., 10 Calc., 814.

(6) Letters Patent Appeal No. 8 of 1899, (unreported).

rahmania Ayyar and Boddam, JJ., is a judgment within the meaning of the article and we overrule the preliminary objection.

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The first point taken on behalf of the appellant (the defendant) was that the case was governed by article 36 of the Letters Patent and not by sections 575 and 647 of the Code of Civil Procedure, and that the opinion of the senior Judge, that the decree of the Munsif ought to be set aside, should prevail. In our judgment the case is governed by section 575 of the Code of Civil Procedure. In the case relied on by the appellant (*Husam Begam v. The Collector of Muzaffarnagar*(1)) the Allahabad Court held that the Letters Patent and not the Code applied upon the ground that there had been no hearing of the appeal within the meaning of section 575 inasmuch as the point upon which the Judges had differed in opinion was a point taken by way of preliminary objection that the appeal was time barred. In the case before us there was a hearing of the petition by a bench of two Judges who differed in opinion as to the way in which the petition should be disposed of. The fact that Boddam, J., was of opinion that this Court ought not to interfere by way of revision for the reason that the case put forward by the petitioner had not been set up in the Court of First Instance is no ground for saying that there has been no hearing of the petition.

As regards the merits, the defendant sought to exercise certain special powers conferred upon landholders by section 38 of the Rent Recovery Act. To prevent these powers being put into force and his interest in the land sold, the plaintiff paid the defendant's claim. On the hearing of the revision petition it was not contended that the defendant was a landholder within the meaning of sections 3 and 38 of the Rent Recovery Act, or that he was by law entitled to exercise the special powers conferred by section 38. In these circumstances it seems to us clear that the defendant having no legal right to sell the plaintiff's interest in the land, and the plaintiff having paid the money in order to escape the injury which he would have sustained if his interest in the land had been sold, the plaintiff is entitled to recover the money paid by him as money had and received by the defendant to the use of the plaintiff. It is not necessary to consider whether the course adopted by the defendant amounts to coercion within

(1) 1 L.R., 11 All., 176 at p. 178.

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the meaning of section 15 of the Indian Contract Act. Section 72 of the Indian Contract Act has no application to this case. The section merely says that a person to whom money has been paid under coercion must re-pay it. The section in no way affects the principle of law that, where the defendant has received money which in justice and equity belongs to the plaintiff under circumstances which render a receipt of it a receipt by the defendant to the use of the plaintiff, the plaintiff is entitled to recover. This was the view taken by the Calcutta High Court in *Jugdeo Naram Singh v Raja Singh*(1) and with this view we agree. Subrahmania Ayyar, J, was of opinion that this money in justice and equity belonged to the defendant if it should appear on evidence being taken that the defendant was the party to whom the rent payable in respect of the land in the plaintiff's holding ought to have been paid. We do not agree with this view. The money was not paid as rent, but as a means of preventing the unlawful sale of the plaintiff's interest in the land.

The fact that the plaintiff may have been under an obligation to the defendant and that defendant may have been legally entitled to enforce that obligation seems to us to be immaterial. The method by which he sought to enforce the supposed obligation was illegal. He purported to exercise certain special rights created by a special act, whereas he did not in law possess these rights.

We think the judgment of the District Munsif was right and the appeal ought to be dismissed with costs.

(1) I L.R., 15 Calo., 656.

APPELLATE CIVIL.

Before Mr Justice Davies and Mr. Justice Boddam.

MUTHAYYA (PLAINTIFF), APPELLANT,

v.

1901.
March 5.

VENKATARATNAM AND ANOTHER (DEFENDANTS), RESPONDENTS *

Registration Act—Act III of 1877, s 17—Withdrawal petition setting out terms of compromise filed in Court but not registered—Subsequent suit for land referred to in the compromise—Necessity for registration

In 1893, plaintiff sued defendants for possession of certain immoveable property. The parties then entered into a compromise by the terms of which defendants were to give plaintiff a portion of the property sued for. They then filed a petition in Court setting out the agreement at which they had arrived and asking that the suit might be withdrawn. The Court thereupon ordered the suit to be struck off the file, and made an order as to costs. The agreement was never registered. Plaintiff, relying on the agreement, now sued to have it established and to recover possession of the property to which he was entitled under it.

Held, that the agreement should have been registered and that the suit brought on it must fail.

SUIT for a declaration of validity of an agreement which had been entered into by plaintiff and defendant in a former suit, for the recovery of immoveable property referred to in that agreement. Plaintiff had, in 1893, brought a suit against first defendant and others for the possession of certain property. In 1895, plaintiff and first defendant filed a petition under section 373 of the Code of Civil Procedure, setting out an agreement to which they had come and requesting that the suit might be "taken off the file without being heard." The Munsif passed the following order:—"Suit struck off the file." He also ordered plaintiff and first defendant to pay the costs of second defendant in that suit. The agreement was not registered. It provided, *inter alia*, that first defendant should give plaintiff only a portion of the property sued for; that plaintiff should relinquish the rest of his claim; that each party should bear his own costs, but that if the Court should give

* Second Appeal No. 39 1900 against the decree of J. H. Munro, Acting District Judge of Godavari, in Appeal Suit No. 253 of 1899, reversing the decree of O. Sivaramakrishnamma, District Munsif of Narsapur, in Original Suit No. 351 of 1898.

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costs to the defendants, plaintiff and first defendant should bear the costs of second defendant in equal shares, and first defendant should bear the costs of the other defendants. Plaintiff now sued to establish the agreement and to recover the property. The District Munsif decreed in his favour, whereupon defendants appealed to the District Judge, who said :—" It is contended that the suit agreement not being registered, is invalid and that plaintiff cannot therefore acquire any interest in the property referred to therein. The suit is based entirely on the agreement, and if it is invalid, the suit must fail. The agreement purports to create rights in immoveable property to the value of over Rs. 100 admittedly and ought to be registered unless for some special reason registration is unnecessary. The respondent's pleader relies upon the observation in *Bundesri Naik v. Ganga Saran Sahu*(1), that the provisions of the Registration Act do not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties or of orders made by the Court. These remarks do not apply to this agreement. It is a withdrawal application upon which the Court ordered the suit to be struck off. The Court was not asked to give effect, nor did it pass any order giving effect to the terms on which, in the application, the parties said they had arranged their dispute. It was open to the parties instead of withdrawing the suit to ask for a decree in the terms of the compromise. They did not choose to do this, and if they intended the agreement to create rights in immoveable property, they should have had it registered. The fact found by the lower Court that the parties have acted upon it and transferred the property thereunder, even if true, does not affect the question." He allowed the appeal and dismissed the suit.

Plaintiff preferred this second appeal.

V *Krishnasami Ayyar*, for appellant, contended that registration was not necessary as the petition which had been presented to the Court formed part of the pleadings in the case, for which, according to *Bundesri Naik v. Ganga Saran Sahu*(1) registration was not necessary under section 17 of the Registration Act. It was not necessary that it should be incorporated in the judicial proceedings in the sense that the Court should include it in its order on the petition. Judicial proceedings include pleadings filed by parties as well as orders passed by the Court.

(1) I.L.R., 20 All., 171 at p. 180.

Sundara Ayyar and *K. Subrahmania Sastri*, for respondents, distinguished *Bindesri Naik v. Ganga Saran Sahu*(1) and referred to *Pranal Anni v. Lakshmi Anni*(2) where the Privy Council defined a judicial proceeding and held that unless the order of the Court was pronounced in terms of the agreement, it did not constitute a judicial proceeding and required registration if title was sought to be derived under it. They contended that the Court had not acted on the terms of the petition in the present case, and that there was no prayer for withdrawal in it.

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JUDGMENT—We think the decree of the District Judge is right. The document on which the plaintiff relies was really a petition for withdrawal and was stamped only as such.

If it is to be relied upon as proof of his case by the plaintiff, it requires to be registered under section 17 of the Registration Act. The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Bhashyam Ayyangar.

SABHAPATHI CHETTI AND OTHERS (CLAIMANTS NOS. 1 TO 6),
APPELLANTS,

v.

1901.
April 19.
September
9, 10.

NARAYANASAMI CHETTI (PLAINTIFF), RESPONDENT.*

*Civil Procedure Code—Act XIV of 1882, ss 278, 279, 288—Claim petition—
“Some interest” in property attached—Order dismissing claim by mortgagees—
Letters Patent, art. 15—“Judgment”—Appeal*

An order passed by a Judge sitting on the Original Side of the High Court dismissing a claim preferred under sections 278 and 282 of the Code of Civil Procedure by the mortgagees of immoveable property which has been attached in execution of a decree, is subject to appeal.

Article 15 of the Letters Patent is not restricted by sections 588 and 591 of the Code of Civil Procedure.

Four persons lent money on mortgage, the deed, with the consent of all, being prepared in favour of one of them alone. It however specified the amount

(1) 20 All, 171

(2) I.L.R., 22 Mad., 508.

* Original Side Appeal No. 33 of 1900 against the decree of Mr. Justice Shephard, on Claim Petition in Civil Suit No. 58 of 1900.

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that each had advanced and provided that if the nominal mortgagee should receive any instalments from the mortgagors, the same should be distributed between all the four mortgagors according to the amounts advanced by them. The nominal mortgagee died, leaving a will appointing executors, who had not, however, taken out probate. A judgment-creditor of the mortgagors then caused the property to be attached, whereupon the three other creditors filed a claim petition asking that the attachment might be declared to be subject to the mortgage.

Held, that the applicants were competent to prefer the claim and establish, within the meaning of section 279 of the Code, "some interest in" the property attached. If the nominal mortgagee was the agent of the applicants, they had a legal interest in the property attached, and if he was a trustee, they had a beneficial or equitable interest therein.

A beneficial interest is as much an interest within the meaning of section 279, as a legal interest in the property attached.

CLAIM petition under section 278 of the Code of Civil Procedure, by several claimants, as mortgagees of a certain house and ground which had been attached by a judgment-creditor of the mortgagors. The petition alleged that the judgment-creditor (plaintiff) had long been aware of the rights of the claimants as mortgagees, and of the fact that the interest of the mortgagors (defendants) was limited to an equity of redemption. The mortgage deed had been executed by the consent of all the mortgagees in favour of one Ramanadan Chetti, since deceased, alone, to secure advances amounting to a lakh and thirty-seven thousand rupees from four persons or firms, of whom Ramanadan Chetti was one, to the mortgagors. The deed provided that whenever any part payment of the mortgage money should be made to Ramanadan Chetti, he should distribute it among the four creditors, in accordance with their shares. It was further provided that Ramanadan Chetti should conduct proceedings against the mortgagors for the purpose of recovering the mortgage debt. Ramanadan Chetti died, and his executors were not joined in this petition, (which was preferred by the other mortgagees), it being explained that the executors were ignorant of the attachment and absent, and had not yet taken out probate to the will of Ramanadan Chetti, and that there had been no time to communicate with them.

The learned Judge sitting on the original side dismissed the claim. He held that the claimants had no interest in the property under attachment, and that the claim should only be made by the executors of Ramanadan Chetti.

The claimants preferred this appeal.

Seshagiri Ayyar and *Raghava Ayyangar*, for respondent, SABHAPATHI
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raised the preliminary objection that no appeal lay, first, because such an order is not included in section 588 of the Code of Civil Procedure as one from which an appeal lies, and the right of appeal, if any, under article 15 of the Letters Patent, is taken away by sections 588 and 591 of the Code; and secondly, because the order was not a "judgment" within the meaning of article 15 of the Letters Patent.

Hon. Mr *P. Anandachari* and *Sundara Ayyar* for appellants.

JUDGMENT.—This is an appeal against the judgment of Shephard, J., disallowing a claim preferred, under sections 278 and 282 of the Civil Procedure Code, by the appellants as mortgagees of a certain house and ground attached in execution of the decree in Civil Suit No. 58 of 1900 on the Original Side of this Court.

The respondent's vakil takes a preliminary objection that no appeal lies against the order disallowing the claim, firstly, because such an order is not specified as an appealable order in any of the 29 clauses of section 588, Civil Procedure Code, and the right of appeal, if any, under section 15 of the Letters Patent, is taken away by the first paragraph of section 588 and by section 591, Civil Procedure Code; and secondly, because the said order is not a judgment within the meaning of section 15 of the Letters Patent.

We are clearly of opinion that neither of these objections is well founded. As regards the first, the matter has been practically concluded by the decision of this Court in *Chappan v. Moudin Kutti*(1), which was heard by a Bench of six Judges and in which it was held by Mr Justice Shephard, Mr Justice Subrahmania Ayyar and Mr Justice Moore that section 15 of the Letters Patent is not controlled by sections 588 and 591 of the Civil Procedure Code. This view was dissented from only by Benson, J. A Full Bench of the Calcutta High Court in *Tootsie Money Dasse v. Sudevi Dasse*(2) unanimously held that section 15 of the Letters Patent is not restricted by section 588 of the Civil Procedure Code and dissented from Mr Justice Benson's opinion that sections 588 and 591, Civil Procedure Code, do restrict the right of appeal given by section 15 of the Letters Patent. The above decisions of this Court and of the Calcutta High Court are in conformity with the decision of

(1) I.L.R., 22 Mad., 68

(2) I.L.R., 26 Calc., 361.

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the Privy Council in *Hurrish Chunder Chowdhry v. Kalisunderi Deb*(1), in which it was held that section 588 of the Code of Civil Procedure restricting appeals against orders did not apply to prevent an appeal to the High Court from the order of a single Judge of that Court, and with the canon of interpretation based on the maxim *generalia specialibus non derogant*, that a general later law does not abrogate an earlier special one by mere implication, (*Thorpe v. Adams*(2), *the Queen v. Champneys*(3) and *Kutner v. Phillips*(4) per A. L. Smith, J., and that when the Legislature has already given its attention to a particular subject and provided for it, it is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language (per Wood, V. C., in *Fitzgerald v. Champneys*(5), also *Maharajah of Jeypore v. Papayamma*(6)). Both section 540 of the Code of Civil Procedure relating to appeals from original decrees and sections 588 and 591 relating to appeals from orders provide for appeals from one Court to another of higher grade. The provision made by section 15 of the Letters Patent for appeals from one or more Judges of the High Court, to other Judges of the same Court is entirely foreign to the provisions of the Civil Procedure Code relating to appeals from one Court to another. The matter is placed beyond all reasonable doubt, by section 597 of the Code of Civil Procedure which occurs in the chapter relating to appeals to the King in Council. It is provided in that section, among other things, that no appeal shall lie, to His Majesty in Council, from a judgment of one Judge of a High Court or of one Judge of a Division Court. The obvious reason for such restriction is, that the party should not be permitted to appeal directly to the King in Council, from the judgment of a single Judge of the High Court, whether passed in the exercise of ordinary original civil jurisdiction or of appellate civil jurisdiction but that he should, in the first instance, appeal, under section 15 of the Letters Patent, to the other Judges of the High Court. The result of holding that no appeal would lie under section 15 of the Letters Patent, from an order of a single Judge in the

(1) I L.R., 9 Cal., 482.

(2) L.R., 6 C.P., 384.

(3) 2 J. & H., 31 at p. 54.

(4) L.R., 6 C.P., 125.

(5) [1891] 2 Q.B., 267.

(6) I.L.R., 23 Mad., 329 at pp. 351, 358-60.

exercise of original civil jurisdiction when such order is not a decree or an order specified under section 588 of the Code of Civil Procedure or from an order of a single Judge, passed in appeal, from any of the orders, specified in section 588 of the Code of Civil Procedure would be that such orders would be final and no appeal would lie, either to other Judges of the High Court or to the King in Council, although from a final order passed by a District Judge in appeal from any of the orders mentioned in section 588, an appeal would lie direct to the King in Council under section 595 (a). The fact that sections 588 and 591 of the Code of Civil Procedure are applicable to the High Court, does not affect the question now under consideration. They are applicable to the High Court, in that appeals from orders of the Subordinate Courts lie to the High Court under section 588 of the Code of Civil Procedure and section 591 prohibits appeals from such Courts to the High Court, except in the cases provided for by section 588

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The second contention that the judgment of Shephard, J., disallowing the claim is not a judgment within the meaning of section 15 of the Letters Patent is entirely untenable and opposed to the current of decisions as to the meaning of the word "judgment" in the said section.

We are unable to concur with the learned Judge, that the appellants have no interest in the property under attachment and that the only person who can advance a claim is the executor of the person in whose favour the mortgage document, exhibit F, was executed. Exhibit F is a mortgage bond for a lakh and thirty-seven thousand rupees, borrowed in several shares from four persons or firms mentioned in paragraph 3 thereof. The respective amounts borrowed from each of these four persons, are specified in paragraph 3 and an express provision is made, that whenever any part payment is made by the mortgagors to the first named of the four persons, viz, Ramanadan Chetti, deceased, in whose favour alone, the mortgage deed was, with the consent of all the four, executed, such amount should be distributed by him, among all the four creditors, including himself, according to their respective shares. A further provision is made in paragraph 4 that it has been agreed that the first named person alone should conduct proceedings against the mortgagors for the purpose of recovering the mortgage debts

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Paragraph 10 of exhibit F is the only one which relates to the house and ground, the subject matter of the attachment in respect of which the claim has been preferred; and it is therein declared by the mortgagors, that the Collector's certificate relating to the house and ground is with them and that they have not already encumbered, nor shall thereafter encumber the said certificate or the house and ground of which the certificate is the title-deed.

With reference to paragraph 4 of the claim petition, it is explained by the learned pleader who appeared before Shephard, J, and who now appears also in this appeal, for the claimants that the deposit of title-deeds mentioned in the said paragraph refers to the Collector's certificate, in respect of the house and ground, specified in paragraph 10 of exhibit F, and that the same was deposited by way of security, subsequent to the execution of the mortgage deed.

It is unnecessary to decide in this appeal, whether, so far as the appellants are concerned, the mortgage deed, exhibit F, was executed in favour of the deceased Ramanadan Chetti, as their agent or as their trustee; for, in either case, the appellants are competent to prefer this claim and establish within the meaning of section 279 of the Code of Civil Procedure, "some interest in" the property attached. If, so far as they were concerned, the said Ramanadan Chetti acted as their agent in the mortgage transaction, they have a legal interest in the property attached and if he was a trustee they have a beneficial or equitable interest therein. And, in our opinion, a beneficial interest is as much an interest within the meaning of section 279 of the Code of Civil Procedure as a legal interest in the property attached.

We are wholly unable to accede to the arguments advanced by the learned pleader for the respondent, that the appellants have only a beneficial interest in their shares of the mortgage debt, as a mere debt or personal claim and have no beneficial interest in the house and ground in question forming the security for such debt.

For the above reasons, we allow this appeal, with costs, and as the learned Judge has practically disallowed the claim only on a preliminary point, we reverse the judgment appealed against and remand the claim for investigation and disposal in due course of law.

APPELLATE CIVIL.

Before Mr Justice Davies and Mr. Justice Moore.

VAPPAKANDU MARAKAYAR AND ANOTHER (DEFENDANTS),
APPELLANTS,

1901.
September
12, 24.

v.

ANNAMALAI CHETTI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

*Contract Act—Act IX of 1872, ss 20, 30, 65—Advance on risk (yogyam) of ship—
Marine Insurance—Contract by way of wages.*

In a document, dated 3rd August 1896, signed by defendants and addressed to plaintiff it was recited that plaintiff had lent a sum of money to defendants on the risk or security ("yogyam") of a ship belonging to defendants "now under sail to the Nicobars" from Negapatam, and the defendants stipulated that "as soon as the said ship starts for and reaches the Nicobar Isles and thence sets sail and goes to Rangoon, Moulmein and from there starts again and reaches Negapatam . . . that is, as soon as the said ship shall come back to the Negapatam harbour again, we shall repay to you on the expiry of eight months from 23rd July 1896" the sum advanced with interest. The ship had left Negapatam on 23rd July 1896 and was lost at sea three days later. Plaintiff sued defendants for the sum advanced, on the ground, among others, that as the vessel had been lost before the date of the agreement, the latter was void, and the defendants were liable to refund the amount advanced.

Held, that he was not entitled to recover. The risk which formed the basis of the agreement, according to its true construction, commenced from 23rd July 1896, as set out in the document, because it was on that day that the vessel sailed from port and commenced to incur the perils of the deep. The agreement was consequently not void under section 20 of the Contract Act, nor were the defendants bound, under section 65 of that Act, to restore to plaintiff the sum they had received under its terms.

Such an agreement could not be held to be in any sense a policy of marine insurance.

Per DAVIES, J.—The suit should be dismissed, under section 30 of the Contract Act, on the further ground that the agreement was one by way of wages.

SUIT for money. The plaint set forth that, on the 3rd August 1896, defendants entered into a written agreement with first plaintiff providing for a loan to defendants of Rs. 1,500 for a period of eight months from 23rd July 1896 on the risk of the voyage of their ship named *Henrietta Elizabeth* then under sail to

* Second Appeal No. 204 of 1900 against the decree of I L. Narayana Rao Acting Subordinate Judge of Kumbakonam, in Appeal Suit No. 90 of 1899, reversing the decree of J. C. Fernandez, District Munsif of Negapatam, in Original Suit No. 256 of 1897.

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the Nicobars, and that in pursuance of the terms of agreement the defendant received from plaintiffs Rs. 1,450 made up of Rs. 1,150 received on the 4th August 1896, and Rs. 300 received on the 8th August 1896, that the said ship set sail from Negapatam on the 23rd July 1896 and sprang a leak the next day and foundered at sea on the 26th July 1896, that as the said ship foundered at sea before the date of the agreement and as it was in an unseaworthy condition when it set sail to the Nicobars, the agreement was void, and that the defendants were therefore bound to repay the amount advanced with interest.

The defence was that the contract had been made before the ship sailed, namely, on 21st July 1896, though reduced to writing on 3rd August 1896, and that, in consequence, it had effect from the date on which the ship sailed; that the ship was in a seaworthy condition when it sailed and was lost through accident; that it was not possible for the ship to have put back to Negapatam, that had that course been adopted, it would have been exposed to the same danger as that incurred by proceeding on the voyage; and that in consequence plaintiffs were not entitled to recover the amount advanced by them. The agreement, which was filed as exhibit D, was as follows:—"Agreement, dated 3rd August 1896, executed to [first plaintiff] by us two persons, namely, [first and second defendants] on the risk (or security) ['yogyam'] of the ship called *Henrietta Elisabeth* belonging to us and now under sail to the Nicobars. We have borrowed from you Rs. 1,500 stipulating to pay away the same within eight months' time from the 23rd July 1896 with vattam or maritime interest at the rate of 12 per cent per annum; and as we have received this sum of one thousand five hundred rupees, from you, we shall, as soon as the said ship starts for and reaches the Nicobar Isles, and thence sets sail and goes to Rangoon, Moulmein, and from there starts again and reaches Negapatam at the Tondi harbour there, that is, as soon as the said ship shall come back to the Negapatam harbour again,—we shall repay to you on the expiry of the eight months from the 23rd July 1896, that is, shall pay to you on the 8th of Panguni next, the aforesaid sum of Rs. 1,500, with its vattam or maritime interest, amount Rs. 180, or in all Rs. 1,680, when we shall take back this agreement from you. If, on the due date stipulated for above, the ship abovenamed should be still abroad sailing in sea, then you will have the ship at your risk till it comes to some

harbour, and we shall pay the amount with the same rate of maritime interest for so much of that period which shall have exceeded the due date given above. If the said ship were to be staying in any other harbour on the due date fixed herein, then we shall wire to the place where it is, and ascertain the same, and then pay you the principal, the interest on the due date. If we fail to pay you the principal and the interest thereon within the time stipulated for herein, we shall then pay you the amount hereof, on demand, with interest at 1 per cent. per mensem, calculating it from the said due date up to the date of payment thereafter." This was signed by first and second defendants.

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The ship was, admittedly, lost at sea on 26th July 1896. Plaintiffs now sued defendants as above. The District Munsif dismissed the suit. He held that it had not been shown that the vessel was in an unseaworthy condition when she left Negapatam, nor that the captain had been guilty of negligence. The Subordinate Judge, on appeal, held that the date of the contract must be taken to be that borne by the agreement, namely, 3rd August 1896; that the existence of the ship and its safe condition was assumed by the parties and was essential to the contract; and that the contract was void under section 20 of the Contract Act, inasmuch as the ship was not in existence at its date. He disagreed with the finding of the Munsif that the captain had not been shown to have been guilty of negligence, holding that the onus which lay on defendants to justify his action in not putting back to Negapatam had not been discharged. He reversed the Munsif's decree and decreed in plaintiffs' favour for the amount claimed.

Defendants preferred this appeal.

V. Krishnasamy Ayyar, Sundara Ayyar, S. Srinivasa Ayyangar and Ananta Krishna Ayyar for the appellants;—The agreement in question is one in the nature of marine insurance. Instead of paying a premium, the defendants agree to pay vattam or marine interest at the rate of 18 per cent. per annum. The underwriter advances the money and, besides the ordinary interest at 6 per cent, get something more for the risk he undertakes. Such a thing was known even in early days. [They referred to Blackstone's 'Commentaries,' volume II, page 601; Kent's 'Commentaries,' volume III, page 551 (bottom paging); Smith's 'Mercantile Law,' volume I, pages 514–515.] The lower Appellate Court is wrong in holding that the agreement is void under section 20

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of the Indian Contract Act. If neither party knew of the previous loss of the ship, the policy effected is nevertheless good (*Mead v. Davison*(1), *The Earl of March v. Pigot*(2), *Bradford v. Symondson*(3), *Stone v. Marine Insurance Co., Ocean, Limited, of Gothenburg*(4) and *Commercial Mutual Marine Insurance Company v. Union Mutual Insurance Company*(5)). It seems to be the English practice to insert the words "lost or not lost" in such policies. But, as is remarked by Arnould in his book on 'Marine Insurance,' volume I, page 235, the insertion of the words is not strictly necessary. The continental practice seems to be the other way; and in America the continental practice is followed, and the words "lost or not lost" do not seem to be generally inserted in policies. [They referred also to *Insurance Co. v. Folson*(6), in which Clifford, J., remarked "where the parties mean to insure a vessel lost or not lost, the use of that phrase is not necessary to make the policy retrospective. It is sufficient if it appear by the description of the risk and the subject-matter of the contract, that the policy was intended to cover a previous loss."] That case is on all fours with the present one. The agreement in the present case, though dated the 3rd of August, is to be retrospective from the 23rd July. The money was advanced on the risk of the voyage of the ship. The ship having been lost, the plaintiffs are not entitled to recover. Section 20 of the Contract Act cannot, from the very nature of things, apply to a case of insurance like this. It is only mistake as to a fact essential to the agreement that will bring a case under section 20. Here, neither party knew the actual state of the ship and the plaintiffs, for valuable consideration, undertook the risk of this unknown matter. If, however, the contract is to be considered as entered into as from the 23rd of July, the subsequent loss of the ship will not relieve the plaintiffs from doing their part under the contract [They referred to the Specific Relief Act] The Privy Council has held that the Contract Act is not exhaustive. See *The Irrawaddy Flotilla Company v. Buguandas*(7). Lastly, the negligence of the master of the ship cannot make the defendants liable (*Trinder, Anderson & Co. v. Thames and Mersey Marine Insurance Company*(8)).

(1) 42 R.R., 401.

(3) L.R., 7 Q.B.D., 456.

(5) 19 Howard, 318.

(7) I.L.R., 18 Calc., 620.

(2) 5 Burrows, 2803.

(4) L.R., 1 Ex. D., 81.

(6) 18 Wallace, 237.

(8) [1898] 2 Q.B., 114.

[DAVIES, J.—Is not the agreement in the present case illegal, as being really a wager?] The lower Appellate Court appears to regard it in that light. [They referred to the judgment; also to 19 Geo. II, cap. 37, as expressly forbidding the making of an assurance upon British ships without further proof of interest than the policies. They contended that the principle was applicable to the present case. *Asan Kuthu Sahib Mercoyar v. Ramanathan Chetti*(1) was also referred to as to the meaning of the word “yogyam” which was translated as “security” in exhibit D in this case.]

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The Advocate-General (Hon. Mr. J. P. Wallis), *Sankaran Nayar, Seshacharian and R. Kuppusami Ayyar* for respondents.— The agreement in question is not one in the nature of marine insurance. No premium has been paid. It contains none of the essentials of marine insurance. The parties were both under a mistake as to the existence of the subject matter of the agreement. So the Indian Contract Act, section 20, applies, and the agreement is void. The English cases quoted by the appellant are not applicable, as in those cases the policies contained the words “lost or not lost.” Those cases were decided with special reference to those words. It is submitted that the English practice, under which these words are invariably inserted to denote retrospective risk, should be followed, and not the continental or the American practice. The reference in the agreement to the 23rd July is made only for the purpose of calculating interest. It is submitted that the Subordinate Judge was right.

The Court delivered the following judgments:—

MOORE, J.—It is shown that, on the 3rd August 1896, the defendants entered into an agreement (exhibit D) with the first plaintiff under which it was provided that the first plaintiff should lend to the defendants a sum of Rs. 1,500 on the risk “yogyam” (as to the meaning of this term—*vide Asan Kuthu Sahib Mercoyar v. Ramanathan Chetti*(1)) of a ship called the *Henrietta Elizabeth* which had started from Negapatam on the 23rd July 1896 for the Nicobars. The terms of this agreement, as I read them, were that the vessel was to sail from the Nicobar Isles to Rangoon and Moulmein and thence to Negapatam, that if she returned safe to Negapatam the defendants should, on the 20th

(1) I.L.R., 22 Mad., 26.

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March 1897, repay to the first plaintiff the sum borrowed from him together with interest at the rate of 18 per cent. per annum, but that if the vessel did not return the first plaintiff lost his money. There are certain other provisions as to what should happen in case the vessel should not have returned to Negapatam by the 20th March, but should be ascertained to be safe elsewhere on that date, which need not be considered as they do not affect the present case. It is admitted that the vessel was lost at sea on the 26th July 1896. The plaintiffs sue for the recovery of the amount actually advanced by the first plaintiff (Rs. 1,450), together with interest, on the following grounds, that the vessel was unseaworthy when she left Negapatam, that the captain was guilty of negligence in not at once putting back to Negapatam when the vessel sprung a leak on the 23rd July and that, as the vessel was lost before the agreement (exhibit D) was entered into, it has become void. The District Munsif dismissed the suit but the Subordinate Judge on appeal gave the plaintiffs a decree.

Both the Courts have held, and there can be no doubt rightly, that it has not been shown that the vessel was in an unseaworthy condition when she left Negapatam. The District Munsif found further that it had not been proved that the captain was guilty of any negligence, but the Subordinate Judge has set aside his finding on this point on the ground, as it would appear, that the burden was on the defendants to show that the captain was justified in not putting back to Negapatam and that they had not done so. There is no evidence whatever to show that the captain was guilty of any negligence or that he did not exercise a sound discretion in proceeding on the voyage. The question is however immaterial as the risk of loss through negligence on the part of the captain was one of the risks to which the first plaintiff was liable under the terms of exhibit D. The main ground on which the Subordinate Judge has reversed the decree of the District Munsif and given the plaintiffs a decree is that, as both parties to exhibit D were on the date on which it was executed under the impression that the *Henrietta Elizabeth* was on that day safe, while as a matter of fact she had been lost some days previously, they were both under a mistake as to a matter of fact essential to the agreement entered into between them and that consequently that agreement was void under the provisions of section 20 of the Indian Contract Act. It appears to me that the finding of the

Subordinate Judge on this point cannot be upheld. He observes that it was no doubt the case that the time fixed for the repayment of the debt was eight months from the date on which the ship started from Negapatam, but holds that it was nowhere stated in exhibit D that the plaintiffs undertook the risk retrospectively from the date of the departure of the ship. This is clearly a mistake. The wording of exhibit D shows beyond all doubt that the risk which formed the basis of that agreement commenced from the 23rd July 1896 as set out in the document, because it was on that day that the vessel sailed from Negapatam and commenced to incur the perils of the deep. Such, it is clear from the wording of the document, was the intention of the parties. It follows that it cannot be held that the agreement entered into by exhibit D was void under section 20 of the Indian Contract Act, and that the defendants are consequently, as has been contended here, bound under section 65 of the same Act to restore to the plaintiffs the sum that they received under the terms of that agreement. It does not appear to me to be necessary to refer to the several cases relating to policies of marine insurance that have been referred to at the hearing of this second appeal, as I agree with the Subordinate Judge in holding that exhibit D cannot be held to be in any sense a policy of marine insurance. The Subordinate Judge has given the plaintiffs a decree for the recovery of the loan made by them under exhibit D on the strength of the provisions of sections 20 and 65 of the Indian Contract Act. As his finding to that effect cannot, in my opinion, be supported for the reasons already given, I would set aside his decree, restore that of the District Munsif, and dismiss the suit with costs throughout.

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The memorandum of objections filed by the respondents is dismissed with costs.

DAVIES, J.—I concur throughout. It appears from Blackstone (volume 2, pages 458 *et seq.*) that agreements similar to this were in vogue in England up to the time of the passing of 19 Geo. II, cap. 37, under the names sometimes of *fenus nauticum* and sometimes *usura maritima* but as they were considered to give an opening for usurious and gaming contracts they were disapproved by the said Statute. Fortified by that pronouncement it seems to me that the present agreement is an agreement by way of wager, and therefore void under section 30 of the Indian Contract Act, and I would dismiss the suit on that ground also.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

VEDAPURATTI (PLAINTIFF), APPELLANT,

v.

AVARA AND OTHERS (DEFENDANTS NOS. 23 TO 26),
RESPONDENTS *

1901
September
13, 18

Malabar Law—Liability of improvements made by sub-tenants of kanomdar for rent due by kanomdar to jenmi—Transfer of Property Act—Act IV of 1882, s 85—Appeal—Parties—Practice

A jenmi having sued the kanomdar and his sub-tenants, obtained a decree for redemption and possession on certain terms. The sub-tenants, objecting to some of the terms, appealed, but they did not join the kanomdar, to whose prejudice the terms were modified on the appeal.

Held, that the kanomdar was a necessary party and that the decree made by the Appellate Court in his absence must be set aside as no reasonable excuse was forthcoming for the omission to make him a party.

Ramunni Panilai v Sankara Panikar (Second Appeal No 1176 of 1889 *infra*) and *Vedapuratti v Govinda Menon*, (Second Appeal No 51 of 1892 *infra*) followed.

Whether improvements made by the sub-tenants of a kanomdar are liable for rent due by the kanomdar to the jenmi—*Quære*.

Achuta v Kaly, (ILR, 7 Mad 345) and *Eressa Menon v Slamu Patter*, (ILR, 21 Mad 135), referred to.

SUIT to recover land devised on kanom, together with arrears of rent. The District Munsif gave plaintiff, the jenmi, a decree for possession on his paying to certain sub-tenants of the kanomdar compensation for improvements made by them. The kanomdar was also made liable for a balance of rent, due after deducting the kanom amount and the value of the improvements made by him. This decree was subsequently amended by the Munsif on plaintiff's application, so as to render the amount due to the sub-tenants as compensation for improvements liable for the arrears of rent due to the jenmi by the kanomdar. The sub-tenants appealed to the Subordinate Judge, but omitted to make the kanomdar a party. They made only the plaintiff, the jenmi,

* Second Appeal No 488 of 1900 against the decree of A. Venkatarao, Subordinate Judge of South Malabar, in Appeal Suit No 32 of 1899, reversing the decree of P. P. Raman Menon, District Munsif of Angadipuram, in Sankar's Petition No 1357 of 1898, in Original Suit No 341 of 1897.

respondent. The Subordinate Judge, treating the appeal as ^{VEDAPURATTI} one preferred from the amended decree, said :—"The question is ^{v.} whether the value of improvements due to under-tenants is liable ^{AYARA.} to be set off against the arrears of rent due from the mortgagee to the mortgagor. No authority is cited in support of the contention that the amounts due for improvements belonging to a sub-tenant are liable to be set off against the arrears of rent due to the mortgagor from the mortgagee. It has been held that such set off is allowable when the improvements belong to a kanomdar (*Achuta v. Kali*(1)) or a tenant (*Eressa Menon v. Shamu Patter*(2)), but these rulings do not apply in a case where the improvements are not the property of the person who is liable to pay the rent. There is not a contract expressly or impliedly allowing a right to such set off and it would manifestly be unjust to charge the arrears of rent due by a mortgagee as against a third party who held the land on an independent simple lease granted by the mortgagee." He held that the amount due as compensation to the sub-tenants was not liable to be set off against the arrears of rent due from the kanomdar to the jenmi, and modified the decree so that it stood in its original form. The effect of this was to reimpose on the kanomdar, in his absence, the liability for arrears of rent, part of which had been removed by the amended decree.

Plaintiff preferred this second appeal.

K R Subrahmanya Sastri, for appellant, contended that by the customary law of Malabar the improvements, no matter by whom effected, are security for rent, and are subject to the lien of the jenmi. That is an incident of the relation of kanomdar to jenmi. A jenmi's right of set off extends to rent that has become barred; *Eressa Menon v. Shamu Patter*(2); *Kanna Pisharodi v. Kombi Achen*(3) followed in *Unnan v. Rama*(4); *Vasudera Shenoi v. Damodaran*(5). He also cited *Achuta v. Kali*(1), where a creditor was only allowed to proceed against the net amount of improvements. In this case, the rent owing to the jenmi exceeded the value of the improvements both of the kanomdar and of the tenants. He referred to Wigram's 'Malabar Law'. He also took the point that in the appeal to the Subordinate Judge the

(1) I L R, 7 Mad, 545 at p 546

(3) I L R, 8 Mad, 381.

(5) I L R, 23 Mad, 86

(2) I L R, 21 Mad, 138

(4) I L R, 8 Mad, 415.

VEDAPURATTI kanomdar had not been made a party, as he should have been,
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 to *Vasudeva Nambudripad v The Collector of Malabar*(1) and
Kesavan v. Sankaran Nambudri(2).

Govinda Menon, for respondents, argued that the cases only go so far as deciding that the improvements due to a mortgagee are liable to a set-off of the amount due by him for rent. There was no case which went the length of deciding that the improvements of a tenant of a kanomdar are so liable. With regard to the omission to make the kanomdar a party to the appeal, he submitted that the Court might add him as a respondent, and failing that he asked for leave to do so.

JUDGMENT—We must allow this appeal. The suit was for redemption, and in the Munsif's Court the rights of all the parties were adjusted. The plaintiff, the jenmi, got a decree for possession on paying compensation for improvements made by them to three sub-tenants of the kanomdar who was himself made liable to the jenmi for a balance of rent due after deducting the kanom amount

(1) Second Appeal No. 459 of 1898 (unreported). The judgment in this case was delivered, on 20th January 1899, by SUBRAHMANYA AYYAR and DAVIES, JJ., as follows—"We cannot agree with the Subordinate Judge in holding that the appeal before him could proceed after the original mortgagees (defendants Nos. 1 to 9) had been struck off from the array of parties to the appeal, on the application of the appealing plaintiff himself. The plaintiff's case was that plot A was part of the mortgaged property which the Subordinate Judge says the defendants Nos. 1 to 9 had not denied. They as the mortgagees thereof were therefore necessary parties, being interested therein. In their absence the appeal should not have been heard and determined, but dismissed. We therefore reverse the decree of the Subordinate Judge passed in the appeal and restore that of the District Munsif with appellant's costs in this and in the lower Appellate Court. Time for redemption is extended to 20th April next."

(2) Second Appeal No. 1423 of 1895 (unreported). The judgment in this case was delivered on 10th February 1897, by SUBRAHMANYA AYYAR and BENSON, JJ., as follows—"The mortgagees were not made parties to the appeal either in this Court or in the lower Appellate Court, though section 85 of the Transfer of Property Act expressly requires that they should be made parties. The appellant's vakil applies that they may now be made parties and explains that he was not able to make them parties to this second appeal as they had not been made parties in the lower Appellate Court. He is, however, unable to give any satisfactory reason for the omission in that Court. In these circumstances we think we are bound to follow the ruling of this Court in *Vedapuratti v. Govinda Menon*, (Second Appeal No. 51 of 1892 (unreported)), and *Ramunni Panikar v. Sankara Panikar*, (Second Appeal No. 1476 of 1889 (unreported)), and dismiss the second appeal with costs, on the ground that the appellant has not complied with the requirements of section 85 of the Transfer of Property Act."

and the value of improvements made by him. After the decree of ^{VEDAPURATTI} the Munsif was passed the plaintiff, the jenmi, applied to him to amend it, by making the value of the improvements due to the sub-tenants liable for the arrears of rent due to the plaintiff, and the decree was amended in this way. The three sub-tenants then appealed to the Subordinate Judge making only the plaintiff, the jenmi, a respondent. The Subordinate Judge held that the appeal was an appeal against the amended decree, allowed the appeal and set aside the amendment, thereby, in appeal, re-imposing on the kanomdar in his absence the liability for arrears of rent part of which had been removed by the amended decree. It is objected that the kanomdar was a necessary party to the appeal under section 85 of the Transfer of Property Act, and not having been made a party to the appeal the decree made in his absence must be set aside as no reasonable excuse was forthcoming for leaving him out in the lower Appellate Court. This was held to be the rule of practice in *Ramunni Panikar v. Sankara Panikar* (1) and this decision has been approved and followed continuously ever since (see *Vedapuratti v. Govindu Menon* (2)) and we think rightly.

In view of this decision it is not necessary for us to decide the important question which was argued before us of the liability of sub-tenants, improvements for rent due by the kanomdar to the jenmi. We may, however, say that we are much inclined to doubt the correctness of the view taken by the Subordinate Judge that they are not liable. His decision seems to us to be *prima facie* opposed to the principle of the cases quoted by him, viz, *Achuta v. Kah* (3) and *Eressa Menon v. Shamu Patter* (4)

(1) Second Appeal No. 1476 of 1889 (unreported). The judgment in this case was delivered, on 13th August 1890, by SHEPHERD and WEIR, JJ, as follows:—
“On the ground that in the appeal as brought in the lower Appellate Court the mortgagees not having been made parties, no effectual relief could have been decreed to the appellant, sixth defendant, we uphold the decree of the Subordinate Judge and dismiss the second appeal without entering on a consideration of the questions of law raised on behalf of the second appellant. The appeal is dismissed with costs”.

(2) Second Appeal No. 51 of 1892 (unreported). The judgment in this case was delivered, on 6th February 1893, by PARKER and SHEPHERD, JJ, as follows:—
“The mortgagees were not made respondents in the lower Appellate Court, nor are they made respondents here. No effectual relief can be given. Following the decision in *Ramunni Panikar v. Sankara Panikar* (Second Appeal No. 1476 of 1889 (unreported)), we dismiss the second appeal with costs”.

(3) I.L.R., 7 Mad., 545.

(4) I.L.R., 21 Mad., 138.

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We allow the appeal with costs in this and in the lower Appellate Court and reverse the decree of the Subordinate Judge and restore that of the Munsif.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Moore.

CHINNASAMI MUDALI (PLAINTIFF), APPELLANT.

1901.
October 4, 10.

v.

TIRUMALAI PILLAI AND THE RIGHT HONOURABLE THE
SECRETARY OF STATE FOR INDIA (DEFENDANT),
RESPONDENT. *

Land Improvement Loans Act—Act XIX of 1883, s. 7, cl. 1 (a)—Revenue Recovery Act—Act II of 1864 (Madras), s. 42—Advance to owner on two pieces of land—Security taken on one alone—Sale of the other piece in respect of advance—Validity

N held two pieces of land on patta and obtained a loan from Government, under Act XIX of 1883, for the improvement of one of them, namely, No. 315. The other piece, namely, No. 105-B, was not made collateral security for the loan. Default having been made in repayment of the loan, piece No. 315 was in 1894 attached and put up for sale and (as there were no bidders) bought in by Government. In 1895, N sold the other piece of land, No. 105-B, to plaintiff, but the patta was not transferred. In 1896, No. 105-B was attached by Government in respect of N's unpaid loan. Plaintiff objected to its sale, claiming title to it as purchaser, and in 1897, both N and plaintiff applied for a transfer of the patta to plaintiff. The transfer was not made as the loan to N had not been repaid. The land was ultimately sold by Government to first defendant, whereupon plaintiff brought this suit for a cancellation of that sale.

Held, that plaintiff was entitled to the relief claimed.

Suit for a declaration that a sale of certain land by Government was null and void, and for an order directing its cancellation. Muthu Annathai Naick held two pieces of land on patta, namely, No. 315 and No. 105-B. He obtained a loan on the security of land No. 315, for the purpose of digging a well thereon, under Act XIX of 1883. Land No. 105-B was not included as collateral security for the loan. Default having been made in

* Second Appeal against the decree of R. D. Broadfoot, District Judge of South Arcot, in Appeal Suit No. 164 of 1899 presented against the decree of C. Sriranga Chariar, District Munsif of Tindivanam, in Original Suit No. 367 of 1898.

repayment of the loan, land No 315 was attached and sold by Government in 1894, and, as no one bid for it, was bought in by Government. Muthu Annathai Naick sold land No. 105-B, on November 12th, 1895, to plaintiff, the sale-deed (which was filed as exhibit EE), being duly registered. The patta was not, however, transferred. In 1896, this land was attached by Government with a view to realising the amount of the loan which still remained unpaid by Muthu Annathai Naick. Plaintiff objected to the sale of the land, and claimed it by right of purchase. No sale took place at that time, but the land remained under attachment. In March 1897, plaintiff and Muthu Annathai Naick jointly petitioned that the patta for the land should be transferred to plaintiff, but the matter remained in abeyance as Muthu Annathai Naick was still in default. The land was subsequently sold in respect of that default by order of the Collector. First defendant became the purchaser; and plaintiff now sued for a cancellation of the sale. The defence was (a) that the sale to defendant was valid and indefeasible, and (b) that the sale under exhibit EE, on which plaintiff's claim was based, was fraudulent. The Munsif upheld both defences and dismissed the suit.

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The District Judge, on appeal, held that sale evidenced by the registered deed exhibit EE was fraudulent. On the first point he said:—"With regard to (a) we have to consider, first, whether the procedure of the Revenue authorities is justified if the debt were an arrear of land revenue; second, whether an arrear under the Loans Act is an arrear of land revenue. Now as between Government and the pattadar the patta is conclusive proof of ownership. If the pattadar parts legally with his property and the transferee will not take the trouble to get transfer of patta, the land in his hands remains liable for any arrear of land revenue due under that patta. The liability is not restricted to an arrear due on the field transferred. The patta is the unit, and if transfer of patta is not got, the legal owner is *qua* Government only in the position of a claimant who may save his interest if he chooses by payment of the arrear. Next, in the Loans Act it is provided that the loan is recoverable as if it were an arrear of land revenue. I am aware of the decision in *Ramachendru v. Petchikanni*(1). That decision was the reason why in later Acts

(1) I.L.R., 7 Mad., 464.

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the Legislature altered the form of words Now Act XIX of 1883 is subsequent to that decision and I have no doubt that the intention of the Legislature was that such loans were to be deemed arrears of land revenue. I think also that the words employed will bear that construction. Hence I find point (a) in favour of defendants "

He dismissed the appeal.

Plaintiff preferred this second appeal.

P. S. Sivaswami Aiyar for appellant.

The Government Pleader for second respondent,

JUDGMENT.—Muthu Annathai Naick obtained a loan under Act XIX of 1883 to be expended in digging a well in land No. 315 held by him on patta. Land No. 105-B was also held by the borrower on patta, but it was not made collateral security for the loan under section 7, clause 1 (d) of the Act. As the loan was not repaid on the date on which it fell due, land No. 315 was attached and sold by Government. No one bid for it and the land was bought in by Government. On the 12th November 1895 Muthu Annathai Naick sold land No. 105-B under a registered document (exhibit EE) to the plaintiff. In 1896 this land was attached by Government in order to realise the amount of the loan still due by the plaintiff's vendor. The plaintiff on the 25th July put in a petition to the Revenue authorities objecting to the sale of land No. 105-B on the ground that he had purchased it from the defaulter. The sale was estopped, but the land, as it appears, remained under attachment. In March 1897 the plaintiff and the defaulter put in a joint petition requesting that the patta for No. 105-B might be transferred to the plaintiff, but the Revenue Inspector ordered that this application should "remain in abeyance" as it appeared that Muthu Annathai Naick had not completed the payment of his loan (exhibit F). Subsequently, under the orders of the Collector, land No. 105-B was sold on account of the loan due by the plaintiff's vendor and was purchased by the first defendant. The plaintiff has brought the present suit praying the Court to cancel the sale and declare that it is null and void. The lower Courts have dismissed his suit and he has preferred a second appeal here. It is clear that it is impossible to uphold the finding of the District Judge that the sale under exhibit EE was fraudulent. The Judge has arrived at this conclusion solely on the ground

that the plaintiff, when he applied for transfer of the patta for land No. 105-B, suppressed the fact that Government had attached the land with a view of recovering the balance of the loan still due by the plaintiff's vendor. The attachment had been made by the Revenue authorities and it must be held that the plaintiff, when he applied to the same authorities for transfer of patta, was entitled to assume that they were not ignorant of what they themselves had done. It is impossible to hold that any fraud has been proved. In the present case it is clear that the Collector, when he attached land No. 105-B and brought it to sale, was attempting to recover the loan granted to Muthu Annathai Naick under section 7, clause 1 (a) of the Land Improvement Loans Act and not under clauses 1 (b), (c) or (d). Clause 1 (a) provides that the amount of the loan, interest, costs, &c, shall be recoverable from the borrower as if they were arrears of land revenue due by him. The question to be decided is therefore whether, when the borrower's patta land was sold under the provisions of that clause, the purchaser (first defendant) at the sale took free of all encumbrances as he would do under the provisions of section 42 of Act II of 1864 (Madras) in case of a sale for arrears of land revenue, or, in other words, has section 42 been extended by section 52 of the same Act to sales for recovery of loans under Act XIX of 1883? The decision in *Ramachendra v Pitchikanni* (1) is a clear authority for the negative of the above proposition unless it can be shown that there is such a difference between the wording of section 10, Act III of 1864 (Madras) and section 7, clause 1 (a) of Act XIX of 1883 as to render this decision inapplicable to the present case. We are of opinion that there is no such difference. In the old Abkari Act it was provided that a Collector could proceed for the recovery of abkari arrears due in like manner as for the recovery of arrears of land revenue, while in the Land Improvement Loans Act it is laid down that arrears shall be recoverable from the borrower as if they were arrears of land revenue due by him. We cannot see any real difference in recovering arrears as if they were arrears of land revenue and proceeding for the recovery of them in like manner as for the recovery of arrears of land revenue. The District Judge is of opinion that the decision in *Ramachendra v. Pitchikanni* (1) led

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(1) I.L.R., 7 Mad., 434.

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the Legislature to alter the form of words used in cases where it was intended that action should be taken under Act II of 1864 to recover arrears other than land revenue. This decision, however, cannot have in any way influenced the Legislature in enacting section 7 of Act XIX of 1883, for it will be found that that Act received the assent of the Governor-General on the 11th October 1883, while the judgment reported at *Ramachendra v. Pitchikanni*(1) was not delivered till the following March.

For the foregoing reasons we must hold that the provisions of section 42 of Act II of 1864 (Madras) do not apply to the sale of land No. 105-B by order of the Collector on account of sums due by Muthu Annathai Naick under the Land Improvement Loans Act and we accordingly allow this appeal, set aside the decrees of the lower Courts and give the plaintiff (appellant) a decree as prayed for. The second defendant (second respondent) will pay his own costs and those of the plaintiff (appellant) and first defendant (first respondent) throughout.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Bhashyam Ayyangar.

1901.
October 8.

LAKSHMINARASAYYA SETTI (PETITIONER No. 2), APPELLANT,
v.

VENKANNA SETTI AND OTHERS (COUNTER-PETITIONERS),
RESPONDENTS.*

Companies Act—Act VI of 1882, s. 169—Appeal from order in winding up—Ex parte application for extension of time—Service of notice within the extended time—Validity of extension made on ex parte application—Right of respondents to raise objections at hearing of appeal.

By section 169 of the Indian Companies Act, 1882, appeals are provided for against orders and decisions made in the winding up of companies, subject to the restriction that no such appeal shall be heard "unless notice of the same is given within three weeks after any order complained of has been made in manner in which notices of appeal are ordinarily given under the Code of Civil Procedure, unless such time is extended by the Court of appeal."

(1) I.L.R., 7 Mad., 434.

* Civil Miscellaneous Appeals Nos. 1 to 4, 8 and 13 of 1901, against the order of Lewis Moore, District Judge of Bellary, on Miscellaneous Petitions Nos. 190, 100, 181, 152, 120 and 162 of 1900, respectively.

Certain applicants, under section 214, for an order against delinquent directors and officers of a company, appealed to the High Court against the order of a District Judge dismissing their petitions. An *ex parte* application was made by them under section 169, for an extension of time during which notice of the appeal might be given, an order for extension was made, and notice was in fact given to the respondents within the time so extended. Upon the appeal coming on for hearing it was objected that the time should not have been extended without notice to the respondents, and that the extension, if granted, should be subject to objection being raised at the hearing:

Held, that notice of the application for extension of time was unnecessary; but, inasmuch as the order granting an extension had been made *ex parte*, the respondents were entitled to raise objection to it at the hearing. Such an appeal must, under section 169, be filed within three weeks of the date of the order, at the latest.

Per BHASHYAM AYYANGAR, J.—While refraining from expressing an opinion, on the point, the terms of section 169 of the Companies Act are probably complied with by lodging the memorandum of appeal.

APPLICATIONS, under section 214 of the Indian Companies Act, against directors and office-bearers, in the Bellary Bank. The petitions were dismissed by the District Judge.

Petitioner No. 2 preferred this appeal.

Dr. S. Swaminadhan, for respondents, took the preliminary objection that the appeals should not be heard, as, though the appeals themselves had been filed within the three weeks provided by section 169 of the Indian Companies Act, the notices were late, as they had not been served on the respondents until after the three weeks period had lapsed. It was true that an extension of time had been granted by the High Court, but the application for that extension was made after the three weeks had expired.

V. Krishnasami Ayyar, for respondents, in a similar interest, supported the preliminary objection. He contended that although an extension of time may take effect retrospectively, (*Ramanappa v. The Official Liquidator, Bellary-Brucepatta Stock and Loan Transacting Company*(1)), exceptional circumstances must be shown, and the order should be obtained after notice to the other side, and should be granted subject to objection at the hearing of the appeal. He cited *In re Sarawak and Hindustan Banking and Trading Company, Limited*(2), and submitted that the "notice" required by section 169 was notice of an appeal already lodged. That case had been decided before the Act had been passed, and the Legislature must

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(1) I.L.R., 22 Mad., 291.

(2) I.L.R., 4 Calc., 704.

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be taken to have approved it. He referred to the corresponding section in the English Companies Act.

Sivasuami Ayyar, for appellants, contended that notice of an application for extension of time was not necessary, and that the *ex parte* order which appellants had obtained was good. He referred to *Wall v. Howard*(1) and *In re National Funds Assurance Company*(2) and the Annual Practice

The preliminary objection was overruled and the appeal heard on the merits.

DAVIES, J.—The respondents were served with notice of the appeal within the extended time allowed by a Bench of this Court, but the respondents allege that the time should not have been extended without notice to them, or at any rate that they should now be permitted to urge their objections to the extension. I am of opinion that no notice was necessary in the first instance, but as the order extending the time was passed *ex parte*, I think the respondents are now entitled to object thereto

As in my opinion, however, the appeal against the order must, under section 169 of the Indian Company's Act, 1882, itself be filed within three weeks of the date of the order at the very latest, it makes it practically impossible to have the notice of the appeal also served within that time. It follows that the Court could not reasonably have refused the extension applied for. The preliminary objection is therefore overruled. On the merits, I consider the Judge was right in dismissing the application, for the charges therein made are too vague, and there is nothing tangible to go upon. Further, there is no distinct averment of any loss. This appeal is therefore dismissed with two sets of costs—one for the first respondent and the other for the fifth and seventh respondents.

BIHASHYAM AYYANGAR, J.—I agree. But the point having just been raised and argued not fully I refrain from expressing any opinion on the question as to whether the latter part of section 169, which prescribes a period of three weeks from the date of the order complained of for giving notice of the appeal, reduces the ordinary period of appeal given by the first part of the section to the making of the appeal, viz., 90 days *plus* the time requisite for obtaining copy of the order appealed against to a period being the difference between the three weeks and the time occupied during those three

(1) I.L.R., 18 All., 214.

(2) L.R., 4 Ch.D., 305.

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weeks in serving notice of the appeal on the respondent after the appeal has been filed, subject to the proviso that if notice is not served within the three weeks the time for service may by special order of the Appellate Court be extended, nor do I express any opinion that the notice of appeal referred to in the latter part of the section, if it means notice to the other party of an intended appeal, should necessarily be served through the Court. The solution of the former question depends upon the correct interpretation to be put upon the expression "notice of the same," i.e., notice of the rehearing or appeal which occurs in the latter part of the section. If it means notice to the other party of the appeal which has been made or filed the appeal of course should have been preferred in sufficient time before the expiration of the three weeks. But if its correct interpretation having regard to the former part of the section be "notice of appeal to be made or of the appeal if any already made" then the ordinary period of limitation for making the appeal apart from the period of three weeks prescribed by the section for giving notice of the appeal whether the same has been filed or is only intended to be filed remains unaffected. I also refrain from expressing any opinion as to whether the giving notice of appeal within three weeks in the manner in which notices of appeal are ordinarily given under the Civil Procedure Code is not simply the lodging of the memorandum of appeal and not the service of the notice of hearing of the appeal on the respondent or of giving him notice of the intended appeal. Even if this were the correct interpretation of the section, as I am inclined to think that it is, there were reasonable grounds in this case for the extension of the three weeks prescribed by the latter part of the section, inasmuch as the general impressions supported by the assumptions made in judicial decisions of this High Court and of the Calcutta High Court is that the appeal itself should be made within three weeks and notice of hearing of appeal also served upon the respondent within the three weeks unless the period of three weeks be extended by an order of the Court.

APPELLATE CIVIL.

*Before Sir Arnold White, Chief Justice, Mr. Justice Benson
and Mr. Justice Bhashyam Ayyangar.*

1901.
October
17, 18.
November
29.
December
3.
— —

DARGAVARAPU SARRAPU (DEFENDANT NO. 3), APPELLANT,
v.

RAMPRATAPU AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 2
AND 3), RESPONDENTS.*

*Sale of goods—Promissory note accepted by vendor for their value—Suit for the
price of goods sold and delivered and not on the notes—Maintainability—
Partnership—Promissory note signed by one of two partners for the price of
goods purchased—Suit by vendor against both partners based on the original
contract—Liability of both partners*

Plaintiffs had sold and delivered opium to defendants on different occasions, taking a promissory note at each sale for the value of the parcel sold. These promissory notes had been signed by one of two partners, they were made payable on demand to plaintiffs or their order and they had not been negotiated. Plaintiffs now sued all the partners for the amount due, claiming the suit as one for the price of goods sold and delivered and not basing it on the notes. The partner who had not signed the notes contended that the suit did not lie as framed, and that it should have been brought on the notes and not for the goods sold and delivered.

Held, that plaintiffs were entitled to sue for the price of the goods sold and delivered, and that both of the partners were liable

Suit for the value of goods sold and delivered. Plaintiffs alleged that defendants Nos. 1 and 2 were undivided brothers, and that they had traded in opium jointly with an elder brother Veerabhadradu, since deceased,—the latter having been managing member trading jointly with his brothers for the benefit of the family. Defendant No. 3 was alleged to have been a partner in the business. Defendants had purchased opium from plaintiffs from time to time from 15th June 1896 forward, and plaintiffs said that when a purchase was made, a promissory note was always executed by whichever of the defendants happened to be present, sums being subsequently paid on account from time to time. Defendants Nos. 1 and 2 pleaded that the suit would not lie as framed, inasmuch as promissory notes had been executed for each parcel of opium which defendants had purchased. They contended that plaintiffs should have

* Appeal No. 106 of 1900 against the decree of J. H. Munro, Acting District Judge of Godavari, in Original Suit No. 8 of 1899.

based their suit upon the notes and not upon the sales. They denied that Veerabhadru had been managing member of their family or that he had traded with them for the benefit of the family, and alleged that he was divided from them and had traded separately. They also denied that they had ever taken opium from plaintiffs or executed promissory notes for its value, or made payments on account of such purchases. Defendant No. 3 denied having been a partner with Veerabhadru at any time, and said no contract had ever been entered into between him and plaintiffs. He admitted having executed a promissory note on 15th June 1896 jointly with Veerabhadru, in plaintiff's favour, but said that he had done so merely to enable Veerabhadru to give security to plaintiffs, and that the said promissory note had been duly met by Veerabhadru. Plaintiffs had not, he said, delivered opium subsequently to 15th June 1896 either to him or to any one else at his request or on his responsibility. He also set up the defence that inasmuch as a promissory note had been given at each purchase, plaintiffs could only sue on the notes and not for the value of the goods sold and delivered. Of the notes, one filed as exhibit C, dated 15th June 1896, was signed by both Veerabhadru and third defendant in respect of the price of the first supply of opium. Other notes, filed as exhibit D series, were executed at later dates by Veerabhadru alone, who did not purport to sign on behalf of, or as agent for, defendant No. 3, nor was it suggested that the name Veerabhadru was the name of the partnership. Though these notes (exhibits D, D1, D2) bore the signature of Veerabhadru alone, they stood in the names of both Veerabhadru and defendant No. 3. It was admitted that the promissory notes had been made and given by the purchasers for the value of opium; that they were payable to the plaintiffs, the vendors, or their order; and that they had not been negotiated by plaintiffs, and had been produced by them in the suit.

The District Judge held that it had not been proved that Veerabhadru was divided from defendants Nos. 1 and 2; that the business had been carried on by Veerabhadru on behalf of the family; that defendant No. 3 had been a partner of Veerabhadru and was liable to plaintiffs' claim; and that the suit was maintainable as framed. He passed a decree against all the defendants for the amount claimed.

Defendant No. 3 preferred this appeal.

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RAPU
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Seshagiri Ayyar, for appellant, argued (a) that the opium had been supplied to Veerabhadrudu alone, and that appellant was not a partner with him in the purchase of opium from the plaintiff, and (b) that even if appellant should be held to be a partner, plaintiff could not sue for the opium sold and delivered but could only sue upon the promissory notes which had been given to him in payment of the price of the opium as and when it had been supplied. On the question whether the suit was maintainable as framed, he contended that it should have been brought on the promissory notes, even though they had not been negotiated. He referred to section 50 of the Contract Act. The notes had been given in consideration of the opium and for no other consideration. He cited *Camidge v Allenby*(1) where the taking of notes as money for the price of goods was held to be a payment, and the debt was held to be discharged; also to *Peacock v Russell*(2) where it was held that default in presentation of a bill taken as collateral security for a debt prevents the creditor from afterwards suing his debtor either on the bill or on the original consideration; also to Lindley on 'Partnership,' pages 180 and 187, and Leake on 'Contract,' page 768.

K. Ramachandra Ayyar, for respondents.

[On questions of fact their Lordships concurred in the findings of the District Judge that defendant No 3 was a partner with Veerabhadrudu, and that plaintiff had sold the opium to both jointly. The judgment then proceeded as follows.]

JUDGMENT — The second contention raised on behalf of the appellant that the plaintiff cannot sue for the balance of the price of opium sold and delivered between the 15th June 1896 and 12th September 1896, and that his cause of action, if any, is only upon the promissory notes which he obtained for the value of the opium, is clearly untenable upon the admitted facts, viz., that the promissory notes were made and given, for the value of opium, by the vendees themselves, payable on demand to the plaintiff—the vendor or order—and the notes have not been negotiated by the plaintiff and have been produced by him in the suit. When a bill or note is given for the price of goods sold and delivered, the presumption is that it is only a conditional payment

(1) 6 B. & C., 373; 30 R.R., 358.

(2) 32 L.J.C.P., 266.

with a recourse to the original debt (*Goldshede v. Cottrell*(1), *Maillard v. Argyll*(2), and *Bottomley v. Nuttall*(3)). So far as exhibit C is concerned, it is a promissory note made and given by both Veerabhadru and the third defendant in respect of the price of the first supply of opium. The subsequent promissory notes D, D 1 and D 2 were signed by Veerabhadru alone; he did not purport to sign on behalf of, or as agent for, the third defendant also; and it is not alleged that the name Veerabhadru is the name of the partnership. The promissory notes are all payable on demand to plaintiff or order. Though D, D 1 and D 2 purport to be executed by both, yet as the promise to pay is only by Veerabhadru, who alone signed them, the third defendant cannot be sued upon these promissory notes as such. If two partners are indebted on the partnership account and one of them alone gives a promissory note for the debt and it is not alleged or shown that the creditor intended to substitute the liability of the one giving the promissory note for the joint liability of the two (*Evans v. Drummond*(4) and *Reed v. White*(5)), the partner who has not joined in the promissory note will continue liable only on the original cause of action and he cannot be sued upon the promissory note. In respect, therefore, of the prices of the supplies of opium covered by exhibits D, D 1 and D 2, the third defendant, as one of two partners, can be liable only on the original cause of action, *i.e.*, the price of the opium supplied on those occasions, and the promissory notes given therefor by the other partner Veerabhadru will in no way affect such liability; and the very fact that the promissory notes were intended to be promissory notes given by both clearly establishes that the creditor did not intend to substitute the liability of one partner for the joint liability of the two.

So far as exhibit C is concerned—and the same would hold good in respect of D, D 1 and D 2 also even if the third defendant were liable to be sued thereon—the third defendant as one of the two joint-makers of the promissory note is primarily liable, and it therefore lies upon him, when resisting a claim for the original debt (the price of opium, covered by exhibit C), to allege and prove

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(1) 2 M. & W., 20.

(3) 5 C.B.N.S., 134; 28 L.J.C.P., 110.

(5) 5 Esp., 122.

(2) 6 M. & G., 40.

(4) 4 Esp., 89.

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that the note is still running or that the plaintiff has endorsed it over in favour of a third person and that it is not in his hands (*Price v. Price*(1) and *National Savings Bank Association, Ltd. v. Tranah*(2)). It is only when the debtor is but secondarily liable as drawer or endorser that the delivery of the bill or note is sufficient *prima facie* answer to the claim founded upon the original cause of action and that it lies upon the creditor to account for the non-payment of the bill or note in a way to revive the liability of the debtor; for, as holder of the bill or note, he is bound to take all steps necessary to obtain payment and to preserve the rights of his debtor upon it, *i.e.*, such steps as due presentment for payment, and notice of dishonour, in default of which (where it is necessary) the debtor is discharged not only from his liability upon the bill or note, but also from the original debt (*per curio Price v. Price*(3), *Bridges v. Berry*(4), *Soward v. Palmer*(5), and *Plimley v. Westley*(6)).

The case of *Camidge v. Allenby*(7) and *Peacock v. Russell*(8) cited on behalf of the appellant fall under the latter class of cases above and are entirely inapplicable to the present case. In the former case the vendor of goods, who accepted from the purchaser in payment of the price certain promissory notes payable to bearer on demand, made and issued by a bank, was guilty of laches in not circulating the same or presenting them to the banker (who became insolvent) for payment, and it was held that the vendor had thereby made the notes his own and consequently that they operated as a satisfaction of the debt. In the latter case, the creditor took a bill of exchange from his debtor as collateral security for the payment of his debt, and when the time for payment came the bill was not paid by the acceptor, but the creditor nevertheless gave no notice of dishonour and the bill consequently became worthless, and it was held that he could not afterwards sue his debtor either on the bill or on the original consideration.

The appeal therefore fails and is dismissed with costs.

(1) 16 M. & W.P., 232, at p. 241.

(3) 16 M. & W., 232, at p. 241.

(5) 8 Taunt., 277.

() 6 . & C., 373; 30 R.R., 358.

(2) L.R., 2 C.P., 556.

(4) 3 Taunt., 130.

(6) 2 Bing. N.C., 249.

(8) 32 L.J. (n-s) C.P., 266.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

SUBBARAYA TAWKER (PLAINTIFF), APPELLANT,

v.

RAJARAM TAWKER AND OTHERS (DEFENDANTS NOS. 2, 3, 1 AND
4 TO 14), RESPONDENTS.*

1901.
November 1.

Hindu Law—Division of family property—Agreement that share of one member in income of village should be paid him by managing member—Subsequent claim for partition.

By an agreement entered into by the members of a family, of whom plaintiff was one, the parties became completely divided in interest in respect of all their property, but so far as a certain village was concerned, it was agreed that plaintiff should receive one-fourth of the net income (on account of his fourth share in the village) from the eldest member of the family, who was to manage it. Plaintiff now sued for partition by metes and bounds of his one-fourth share in this village :

Held, that the agreement was no bar to the suit.

SUIT for partition. Plaintiff and defendants were the descendants of K deceased. In 1884, the parties effected a division of all the family property, entering into an agreement (filed as exhibit A) with defendants, which provided as follows:—That with regard to a certain village, plaintiff should receive one-fourth share of the profits (on account of his share of the village) from the managing member of the family; and that with regard to the family house, if plaintiff should not wish to live in it, he should receive Rs. 500 in lieu of his right of joint occupation. Plaintiff now contended that this agreement was not binding on the co-parceners (being in restraint of their right to demand partition), and he claimed that inasmuch as alienations had been made of the shares of some of the members, he was entitled to demand partition, which he accordingly did. The principal point of defence was that the plaintiff was debarred by the terms of the agreement from claiming partition of the lands or house: and that if he did not wish to reside in the family house, he was entitled only to claim the Rs. 500, agreed upon, and not partition.

* Second Appeal No. 339 of 1900 against the decree of H. G. Joseph, District Judge of Trichinopoly, in Appeal Suit No. 235 of 1898, reversing the decree of T. A. Krishnasami Ayyar, District Mansif of Trichinopoly, in Original Suit No. 210 of 1897.

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The Munsif held that with regard to the lands exhibit A was not binding, as the alienees would be entitled to enforce partition, and if they did so, the arrangement arrived at in exhibit A would become impossible. With regard to the house he held that exhibit A was binding and that plaintiff could only claim the Rs. 500. He decreed in plaintiff's favour for possession of his one-fourth share in the lands, and dismissed his claim for partition of the house.

The District Judge, on appeal, said:—"The only ground on which the Munsif's finding is attempted to be supported is that exhibit A is invalidated in the case of the lands because the arrangement which it evidences with regard to them has become impossible. There is nothing to show any impossibility either with regard to the one item or the other. The law as at present established would seem to be that there is no decision that an agreement against partition should not be valid as against the parties making it. It is an agreement entered into by certain men in enjoyment of joint property to restrain any individual from exercising his right to separate enjoyment and the consideration for it would naturally be the common welfare. And I can see no reason why such an agreement should be void in essence, or voidable at the direction of one of the parties." He referred to Mayne's 'Hindu Law,' 4th edition, section 145, and held that plaintiff was not entitled to avoid the agreement (exhibit A) with regard either to the land or the house. He allowed the appeal and dismissed the suit.

Plaintiff preferred this second appeal

C Sankara Nan, P. S. Saraswami Ayyar and R. Krishna Ayyar
for appellant

T. Balakrishna Bhat for first and second respondents

JUDGMENT.—We are unable to agree with the decision of the District Judge

Under exhibit A the members of the family became completely divided in interest in respect of all their property, but so far as the village now in question is concerned it was agreed that the plaintiff was to receive one-fourth of the net income (on account of his one-fourth share of the village) from the oldest member of the family who was to manage the village.

Such an agreement cannot bar the plaintiff's right to sue for partition by metes and bounds of his one-fourth share of the village, as one of the four tenants in common.

As regards the house, the plaintiff agreed to receive Rs 500 in lieu of his share in the event of his refusing to live in the house. He is not entitled to a partition of it if the co-sharers are willing to pay him the Rs 500

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We therefore set aside the decree of the lower Appellate Court, and modify the decree of the District Munsif by directing that the plaintiff do recover one-fourth share of the house unless the co-sharers or any of them deposit in Court for payment to the plaintiff Rs. 500 within three months from this date. In other respects we restore the decree of the District Munsif.

Plaintiff must have his costs in this and in the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

THE ZAMINDAR OF VIZIANAGRAM (DEBENDAN),
APPELLANT,

1901
November 11,
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v.

BEHARA SURYANARAYANA PATRULU (PLAINTIFF),
RESPONDENT.

Limitation Act—Act VI of 1877, sect II art 116. Plea of title claiming registered—Lease of village—Failure by lessee to put lessee in possession—Execution contract to deliver such possession as the nature of the property admits—Merely creation of lease of village, not a delivery of possession

By a registered document dated 11th November 1893, defendant leased certain villages to plaintiff for a term of seven years and eight months. On 5th December 1893, plaintiff applied to be put into possession of the villages but never obtained possession. On 11th November 1899 plaintiff brought this suit for possession and in the alternative for the damages which he had sustained by the failure on the part of defendant to put him into possession. On the plea of limitation being set up

Held that the claim for damages was not barred, it being governed by article 116 of schedule II to the Limitation Act. Both in the case of a sale and of a lease, the registered instrument by which such sale or lease is effected not only operates as a grant, but in the absence of a contract to the contrary is also

* Appeal No 172 of 1900 against the decree of M D Bell, District Judge of Vizagapatam, in Original Suit No 20 of 1899

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construed and operates as an executory contract to deliver to the vendee or lessee such possession of the property as its nature permits; and the breach of such an obligation is a breach of a contract in writing registered within the meaning of the article referred to.

It was also contended by the defendant that inasmuch as the ryots were in actual occupation of the villages which formed the subject matter of the lease, the defendant had, in fact, by the mere execution and delivery of the lease, given plaintiff such possession as the subject matter of the lease permitted and that plaintiff could have collected the rents without any further act on the part of the defendant:

Held, that possession had not been given.

SUIT to recover possession of certain villages and for damages, and, in the alternative, for damages in lieu of possession. The following statement of facts is taken from the judgment of the High Court:—"Respondent, as the lessee under the late Maharajah of Vizianagram, the predecessor in title of the defendant, under a registered instrument in writing, dated 11th November 1893, for a term of seven years and eight months ending with June 1901, brought this suit on the 11th November 1899, alleging that he has not been put in possession of the villages let to him and that in February 1898 defendant had recovered possession of the villages from the vendor who, on the 23rd October 1893, executed a registered sale-deed in favour of the late Maharajah of Vizianagram, and praying that he may be put into possession of the villages for a term of eight years (meaning apparently seven years and eight months) either from the date of the plaint (11th November 1899) or from February 1898. He also claimed Rs. 2,000 for damages from February 1898 to the end of July 1899, presumably in the event of the term commencing from February 1898. He also claimed in the alternative that, in the event of the Court holding that he cannot recover possession of the villages for the said term, he may be awarded as damages a sum not exceeding Rs. 9,000, in addition to the Rs. 2,000 already referred to. The defendant, while admitting the lease sued upon, resisted the suit by alleging that the plaintiff, who was the manager of the vendor of the villages in question, instigated the vendor to contend that the sale-deed was false and inoperative and in collusion with the vendor prevented the vendee, the lessor of the plaintiff, from getting possession of the villages and that the plaintiff also forfeited the lease by his misconduct. The defendant also pleaded that, even if the lease is to be enforced, the

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plaintiff can be put into possession only till June 1901 and that the claim for damages is unsustainable. The following issues were framed :—

“(1) Whether the lease in favour of plaintiff has become inoperative by plaintiff's conduct (collusion and denial of title) ?

“(2) Whether it is forfeited ?

“(3) Whether the plaintiff sustained any, and, if so, what damages ?

“(4) If the lease is valid and binding on defendant, whether the term of eight years can now be enforced ?

“(5) What relief is plaintiff entitled to ? ”

The District Judge passed a decree directing defendant to deliver of possession of the villages to plaintiff for eight years from February 1898, together with profits for the year 1899-1900, and subsequent profits till delivery and Rs. 2,000 as damages.

Against that decree defendant preferred this appeal.

C. Sankaran Nayar and *T. Rangachariar* for appellant.

P. R. Sundara Ayyar, *C. R. Thiruvengatachariar* and *V. Ramesam* for respondent.

The contentions raised and the material portions of the documents relied on are given in the judgment.

JUDGMENT.—[After setting out the above statement of facts the judgment continued ;—] On the 23rd April 1900, the District Judge passed a decree in favour of the plaintiff directing the defendant to deliver possession of the villages to the plaintiff for eight years from February 1898, together with profits for the year 1899-1900, and subsequent profits till date of delivery besides paying Rs. 2,000 on account of damages for the plaintiff having been kept out of possession from February 1898 to the date of the suit (11th November 1899).

Against this decree the defendant appeals and the chief contentions raised in support of the appeal are—

- (1) that the decree for possession for eight years from February 1898 is in any event clearly wrong ;
- (2) that it was owing to the plaintiff's obstruction that the lessor (the defendant) was unable to get possession from the vendor and put the plaintiff in possession of the villages ;
- (3) that the plaintiff (respondent) has forfeited the lease by reason of his conduct both before and during the

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prosecution by the defendant of Original Suit No 34 of 1894 instituted by the defendant against the vendor for the recovery of the villages; and

(4) that the suit is barred by the law of limitation

The first contention is well founded and we are unable to see on what principle the District Judge converts a lease for a term of seven years and eight months ending with June 1901 into one for an equal period ending with February 1906. The fact that the lessor obtained possession from the vendor only in 1898 can be no reason for substituting a new lease in lieu of the one actually agreed to between the parties and given. The finding, therefore, of the District Judge on the fourth issue and the decree as given are manifestly untenable and the respondent's vakil is not able to support the same. So far as the plaintiff's prayer for possession is concerned, he can recover possession only for the unexpired portion of the term ending with June 1901; but as that also has expired during the pendency of this appeal—and the execution of the decree has been stayed until the disposal of this appeal—the real question to be determined in the case is whether the alternative claim advanced by the plaintiff, on which alone he now principally relies, is sustainable.

We agree with the District Judge in his finding on the first issue that no collusion between the plaintiff and the vendor, such as would make the lease inoperative, has been established, nor that the plaintiff prevented the vendee—his lessor—from getting possession of the villages. And we also agree with him in his finding on the second issue that no specific denial of the lessor's title by the plaintiff has been made out and that the plaintiff not having been put into possession, there has been no forfeiture, by him, of the lease. We cannot accede to the contention of the appellant's pleader that having regard to the peculiar terms of the lease sued upon, the legal relation between the plaintiff and the predecessor in title of the defendant should not be regarded as that of an ordinary lessor and lessee whose mutual rights and liabilities are regulated by the principles of law enunciated, among others, in sections 108 and 111 of the Transfer of Property Act. The transaction is essentially one of lease and it is not the less so because the lessee represented that he would be faithful to and merit the favour of the late Maharajah, and would give him information of things that take place and, among other things,

stipulated, in view to ensuring the punctual payment of rents to the lessor out of the actual collections, that he would hold his cutcherry in the building provided for the Sircar cutcherry in the principal village and secure the collections in a box under a joint seal of himself and the lessor's clerk and also undertook to give sub-leases only to solvent persons and to act as the lessor's agent in respect of certain repairs of tanks, &c, and in regard to certain descriptions of land not included in the lease. receiving a remuneration of 15 per cent. on the income derived from such lands. So far therefore as the lease of the villages in question is concerned—and the suit is only in regard to the lease—the plaintiff is, in the absence of any justification on the part of the defendant, clearly entitled to damages for not having been put into possession of the villages comprised in the lease although by his petition, exhibit III (4), dated 5th December 1893, he brought to the notice of the late Maharajah of Vizianagram that his Muktyar Jagannatha Raju Pantulu Garu and others were delaying the registration of the lease and did not put him into possession of the villages leased. but on the contrary were issuing orders directing the ryots and others in the villages comprised in the lease not to pay to anybody the rents due for the current year without the orders of the lessor's Sircar, and requested the Maharajah, immediately on receipt of the petition, to have the cowl registered, to put him in possession of the villages leased to him and to issue orders not to obstruct him in the collection of rents in the different villages leased to him. It is urged on behalf of the appellant that as the plaintiff was only an ijaradar or lessee under the late Maharajah, the ryots being in actual occupation of the land, the lessor by the mere execution and delivery of the lease, did put the plaintiff in such possession as the subject-matter was capable of and that without any further act on the part of the lessor, it was open to the lessee to collect the rents and recover the same, if necessary, by instituting legal proceedings against the ryots. This argument may seem plausible, but no more so than in the case of a lease of land itself, for even if the lessor does not put the lessee into possession of the land it would be open to the lessee to recover possession of the land by instituting, if necessary, a suit in ejectment against the person who wrongfully withholds possession from the lessee. The subject-matter of the lease was capable of delivery in a manner analogous to the mode indicated by sections 264 and

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319 of the Code of Civil Procedure. According to the common law of the land which specially prevails in Zamindaris and similar estates, the delivery of possession, when the owner transfers the estate or a portion thereof, by sale, gift, lease or otherwise, is by the issue of orders or notices to the karnams and other village officers whose duty it is to collect rents from the persons in occupation of the land and also, though not invariably, by a general proclamation addressed to the ryots and other persons in occupation of the land, giving intimation of the transfer in question and requiring them to attorn and pay rents to the transferee. It is really this customary law that is embodied in sections 264 and 319, Civil Procedure Code, and adapted for the delivery, by Court, to the decree-holder or purchaser in execution of a decree, of all descriptions of immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy. Admittedly no such notices or orders were issued to the village officers or ryots of all or any of the villages in question by the late Maharajah or his officials.

It is next urged that the plaintiff himself in conjunction with the vendor, whose manager he was, prevented the lessor from obtaining possession of the villages from his vendor. The argument on this part of the case proceeded tacitly on the footing that the lease was not one independent of the sale transaction, and that the vendor himself was really the lessee under the vendee, the plaintiff being merely the nominal lessee. If that were really so the argument would have been conclusive. The plaintiff, however, brought the suit as the real lessee and paragraph 3 of the written statement expressly treats the plaintiff as the person who applied for the lease and to whom the lease was given and intended to be given; and it is nowhere suggested, either in the written statement or even in the examination of the witnesses, that the plaintiff was only a benami lessee; and the issues proceed on the express footing that the plaintiff himself was the lessee. If he was the real lessee it would *prima facie* be certainly detrimental to his interests that he should prevent his lessor from getting possession of the villages from his vendor and the onus lies very heavily on the defendant to establish that he really did do so and to suggest some motive for his doing so. The sale took place on the 23rd October 1893 and the lease was granted to the plaintiff almost

immediately thereafter on the 11th November following. If the lessee was taking steps to prevent the Zamindari officials from collecting the rents, in order that he might obtain possession and collect rents as lessee, the lessor cannot complain that he was prevented from obtaining possession from his vendor and that by reason of such conduct on the part of the plaintiff he was unable to deliver possession of the villages to him. It will not be enough for the defendant simply to show that the plaintiff tried to obtain possession. He must show that he actually assisted the vendor and in collusion with him prevented the late Maharajah of Vizianagram from getting possession and did so in order that possession might be retained by the vendor himself. The evidence on behalf of the defendant, such as it is, falls far short of this and is indeed very meagre.

[Their Lordships then dealt at length with the evidence.]

The plaintiff examined certain witnesses to show that the plaintiff did not prevent the late Maharajah from taking possession of the villages and some of them say that the plaintiff assisted the Maharajah's officials in taking possession and asked the tenants to execute muchilikas in favour of the Maharajah, but that it was the vendor who obstructed possession being taken. It is unnecessary to consider the evidence on behalf of the plaintiff on this point, as the defendant, on whom the onus lies, has entirely failed to establish, by any credible evidence, that the plaintiff, in collusion with the vendor, prevented his lessor—the vendee—from taking possession of the lands bought by the latter or that he wrongfully induced the vendor not to deliver possession of the villages sold by him.

The third contention that the lease has been forfeited and that the plaintiff is not entitled to any damages is equally untenable. If the lessor was in default in not delivering possession of the property let to the lessee, it is difficult to see what is the condition in the lease which the plaintiff has violated. The lease provides that in default of the lessee paying the different instalments of rent on the due date, the lessor may re-enter and either continue the lease in favour of the lessee or give a lease of the villages to others. The lease after imposing certain other conditions upon the lessee, every one of which presupposes that the lessee has obtained possession, provides as follows:—"If it should come to your notice and if it is proved positively that I have violated any of the aforesaid conditions or that I have proved faithless to Sircar and

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acted contrary to their interest and authority, the Sircar may lease out the taluk to others as it pleases without having anything to do with the conditions hereinbefore set forth." The appellant's pleader argues that the plaintiff deposed against the interest of the defendant, in Original Suit No. 34 of 1894, that his evidence was disbelieved and that therefore it must be taken that he has proved faithless to the defendant and acted contrary to his interest and authority. That was a suit brought by the defendant against the vendor. In that case, the vendor—the defendant therein—raised various pleas in answer to the suit, among others, that the sale-deed was really intended to operate only as a mortgage-deed and that the vendee did not pay the full amount of the consideration for the transaction. The vendor's minor sons also, who were joined in the suit, raised special pleas in resisting it. Eventually the suit was decided against the vendor and in favour of the plaintiff in that suit—the defendant herein. The condition in the lease that the plaintiff should be faithful to his lessor and not act contrary to his interest or authority, can be construed as having reference only to their relation as lessor and lessee of the villages comprised in the lease. The lessor not having done all that was in his power to deliver possession to the lessee, plaintiff cannot be charged with having acted contrary to the interest of his lessor in the matter of the lease, by deposing in favour of the vendor, whether falsely or truly, as a witness in Original Suit No. 34 of 1894. His deposition in that suit has been marked as exhibit II herein and he there distinctly stated as follows.—"Plaintiff's [lessor's] men prevented me from getting possession; plaintiff sent notices to the ryots not to pay rent either to first defendant [vendor] or to me; first defendant also issued notices not to pay either to plaintiff or to me. Thereupon I sent registered letters to the plaintiff saying that I had not been put in possession and that unless he put me in possession, he would be liable for any losses I sustained thereby. No reply was sent . . . I did not try to collect rents on behalf of first defendant; I tried to collect rents on my own behalf. I don't know if my brother tries to collect any rent on behalf of the first defendant. About three months after the sale-deed, first defendant told me not to collect rents as renter. The plaintiff collected the rents of some villages in October 1893, first defendant also collected the rents of some villages." Even if the lessor had done all that he ought to have done to put the plaintiff

into possession, it has not been shown how the deposition of the latter in Original Suit No. 34 of 1894 would subject him to a forfeiture of the lease merely because his evidence was adverse to the contentions raised in that suit by his lessor. Even assuming for the sake of argument that the plaintiff incurred a forfeiture of the lease, either because he broke an express condition providing that on breach thereof the lessor may re-enter or the lease shall become void or because he renounced his character as lessee by setting up a title in a third person, there is nothing to show that the lessor did any act showing his intention to determine the lease. From the very commencement and before any forfeiture could possibly have been incurred by the lessee, the lessor completely ignored the lease. After recovering possession of the villages from the vendor in 1898, the defendant issued a notice to the plaintiff (exhibit B, dated 14th February 1899) informing him that the lease under which he was claiming to get muchilikas from the ryots ceased from the date that the estate was taken under management by the Government and warning him from further interference with the samasthanam and its ryots. This notice clearly shows that there was no forfeiture of a lease and that the same was not determined by reason of any such forfeiture. The plaintiff, therefore, is clearly entitled to damages on the alternative case set up by him in the plaint. He may elect to claim either profits of immoveable property to which he was entitled but which have been wrongfully received by the defendant or damages for breach of the obligation to put him in possession of the villages, subject of course to the law of limitation applicable to each.

The defendant obtained possession from the vendor only in February 1898 and the plaintiff can claim mesne profits against the defendant only from that date, until the expiration of the term of the lease in June 1901. The defendant no doubt obtained a decree, in ejectment, against the vendor, in Original Suit No. 34 of 1894, with mesne profits prior to February 1898 and if he did realize the mesne profits awarded, from the vendor who was wrongfully receiving the profits of the land, subsequent to the sale by him and to the lease by the vendee in favour of the plaintiff, the plaintiff may possibly be entitled to recover the same from the defendant. But it does not appear that the defendant did recover the mesne profits awarded to him in the decree in Original Suit No. 34 of 1894 or any portion thereof and the

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appellant's pleader states that the same has not been realized and there is no likelihood either of its being realized. However this may be, in any event, under article 109 of the second schedule to the Limitation Act, the plaintiff cannot claim mesne profits for any period prior to 11th November 1896 and the respondent's vakil, therefore, prefers that damages should be assessed on the footing of the lessor's breach of obligation to put the plaintiff into possession either on the 11th November 1893, when the lease was completed, or on the 5th December 1893 [the date of exhibit III (b)] when plaintiff requested to be put in possession. It is, however, contended on behalf of the appellant that the claim for damages on this footing is barred by the law of limitation and that article 116 of the Limitation Act prescribing a period of six years is inapplicable to the case and that the period of limitation applicable is only three years, though it is not specified under what article of the Limitation Act. In our opinion, the case is governed by article 116 and it is immaterial whether the period of six years is to be reckoned from the 11th November or the 5th December 1893, inasmuch as the suit was instituted on the 11th November 1899. The lease is in writing registered and the plaintiff's claim for damages is, within the meaning of article 116, one for compensation for the breach of a contract in writing registered. In *Coe v. Clay*(1), the defendant had agreed to let the plaintiff certain premises *per verba de presenti* and the action was brought for the recovery of damages for not letting the plaintiff into possession, which, a preceding occupier having wrongfully refused to quit, the defendant was unable to effect. It was contended on behalf of the defendant that the plaintiff had shown no breach, in that, the agreement amounting to an actual demise of the premises, the plaintiff had an interest upon which he might have brought an ejectment, and it was no default in the defendant, if a person not claiming under him committed a wrong for which the plaintiff had a distinct remedy by ejectment. This plea was overruled and it was held that he who lets agrees to give possession and not merely to give a chance of a lawsuit. This decision was followed in *Jinks v. Edwards*(2) on the ground that the instrument in that case operated, as in *Coe v. Clay*(1), as a lease and not a mere agreement to give a lease. We may also refer

(1) 5 Bing., 440.

(2) 11 Exch., 775.

to *Drury v. Macnamara*(1) which was distinguished from *Coe v. Clay*(2), on the ground that the instrument relied on in the case did not operate as a lease, but was merely an executory agreement. Section 108 (b) of the Transfer of Property Act simply lays down the law as it existed prior thereto in accordance with the above decisions.

Both in the case of a sale and of a lease, the registered instrument by which such sale or lease is effected not only operates as a grant but in the absence of a contract to the contrary, is also construed and operates as an executory contract to deliver to the vendee or lessee such possession of the property as its nature admits and the breach of such obligation is a breach of a contract in writing registered, within the meaning of article 116 of the Limitation Act. The present case is stronger as to the application of article 116 than *Krishnan Nambiyar v. Kannan*(3) which is relied upon by the respondent's pleader. The appellant's pleader relies upon *Varavan v. Ponnayya*(4) and *Avuthala v. Dayumma*(5) and draws particular attention to section 55 (5) (b) of the Transfer of Property Act in connection with the latter case. The first of the two cases cited on behalf of the appellant has no bearing upon the question under consideration. In the second, it was held that article 116 was inapplicable to a personal claim against the vendee for payment of the purchase money, when it was sought to apply that article by reason of the registered sale-deed having acknowledged receipt of the payment of purchase-money, and the claim for purchase money was made not under the document evidencing the sale-deed but in spite of it. Referring to the case of *Krishnan Nambiyar v. Kannan*(3)—now cited on behalf of the respondent—the learned Judges observed as follows:—"The obligation on the part of the buyer to pay the purchase money is different from the obligation arising under a covenant for title, such as was in question in the case cited (*Krishnan Nambiyar v. Kannan*(3)). The obligation to pay arises from the contract between vendor and purchaser, whereas the covenant for title is implied or expressed in the conveyance" In a recent judgment of this Court (*Seshachella Naicker v. Varadachariar*(6)) the decision in *Avuthala v. Dayumma*(5) was considered and followed. It was there explained that a recital in a sale-deed that the consideration had been paid to and received by the vendor cannot be construed

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(1) 5 E. & B., 612, 25, L.J Q.B., 5.

(3) I.L.R., 21 Mad., 8.

(5) I.L.R., 24 Mad., 233.

(2) 5 Bing, 440.

(4) I.L.R., 22 Mad., 14.

(6) I.L.R., 25 Mad., 55.

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as a contract to pay the consideration money ; but that if the oral agreement or contract of sale which preceded the actual sale had also been reduced to writing, as is very often the case, in the registered deed of sale itself, the case might be different and article 116 might apply. The appellant's pleader argues that the decision in *Aiuthala v Dayumma* (1) governs this case because it was there held that article 116 did not apply to a suit for the recovery of purchase money notwithstanding that it is provided in section 55 (5) (b) of the Transfer of Property Act that the buyer is bound to pay on tender at the time and place of completing the sale, the purchase money to the seller or such person as he directs. The answer to this argument is furnished by section 55 (1) (d) of the Transfer of Property Act which provides that, in the absence of a contract to the contrary, the seller is bound to execute the conveyance only on payment or tender of the amount due in respect of the price. Though the payment of the purchase money has to be made at the time of completing the sale and in that sense the payment and the sale take place simultaneously, yet the payment immediately precedes the execution of the conveyance, whereas in the case of delivery of the property sold or leased to the vendee or lessee as the case may be, such delivery, in the absence of a contract to the contrary, has only to follow the completion of the sale or lease and not precede the same.

In our opinion, therefore, the claim for damages for breach of the obligation to put plaintiff in possession of the villages is not barred by the law of limitation, and the only question which remains to be considered is the amount of damages to be awarded. The measure of damages is the amount of profits with interest thereon at 6 per cent per annum which would have accrued to the plaintiff if he had been put in possession of the villages and was in enjoyment of the same during the term of the lease.

As the parties do not agree as to the amount of damages to be thus assessed, the District Judge will try the following issue on the evidence already on record and such further evidence as may be adduced on both sides and submit his finding within six weeks from the date of receipt of this judgment —

“What is the amount of net profits, with interest thereon, calculated as aforesaid, which the plaintiff would have derived from the villages leased to him, if he had been in possession of the villages during the term of the lease” ?

(1) I.L.R., 24 Mad., 233.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

SIVA PANDA (DEFENDANT), APPELLANT,

1901.
December 10,
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JUJUSTI PANDA (PLAINTIFF AND PLAINTIFF), RESPONDENT *

Contribution as between judgment debtors—Decree against two defendants jointly—Satisfaction by one of them—Prima facie case made by production of judgment and certificate of satisfaction—Joint tort-feasors

Where the amount of decree has been recovered from one of two judgment-debtors against whom it was jointly passed and he sues the other judgment-debtor for contribution *prima facie* case is made by the production of the judgment and the certificate of satisfaction. That judgment is conclusive as between the judgment-debtors in the sense that it will not be open to either of them to contend that the former suit should have been dismissed or that one of the parties should not have been held liable to the decree-holder therein, or that the amount decreed was excessive or based on principles erroneous on the face of the judgment. But it will be open to the party from whom contribution is sought without impugning the propriety of the judgment to plead and establish that as between the joint debtors the plaintiff is solely liable for the debt or that the defendant is not equally liable with the plaintiff or that the suit is not maintainable by reason of the fact that the plaintiff and the defendant are joint tort-feasors in a sense in which, on public grounds, the right to claim contribution is negatived.

And though it may have been rightly held in the former suit that both judgment debtors were jointly liable for the mesne profits of land for three years, it will still be open to the defendant in the suit for contribution to show that the plaintiff alone enjoyed those profits and in that case the plaintiff will not be entitled to contribution.

Whether the principle laid down in *Minnath v. Nicon* (S.T.R. 181) should be followed in India.—*Quære*

CLAIM for contribution. Plaintiff and defendant were sued in Original Suit No 156 of 1899 on the file of the District Munsif's Court at Aska, and a decree was passed against them jointly directing them to deliver over certain land to the plaintiff in that suit and to pay him Rs 43-15-10 on account of profits and Rs. 31-3-6 as costs. The sum of Rs 82-6-4 was recovered from the present plaintiff in execution of that decree, and plaintiff now brought this suit for contribution, contending that defendant was

* Appeal under article 15 of the Letters Patent against the judgment and order of Mr. Justice Davies, dated the 18th July 1901, in Civil Revision Petition No. 36 of 1901 preferred from the decree of K. Ramalinga Sastri, District Munsif of Aska, in Small Cause Suit No 386 of 1900.

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liable to repay him one-half of the aforesaid amount, namely, Rs. 41-3-2. The defendant, in his written statement, pleaded that he had remained *ex parte* in Original Suit No. 156 of 1899; that plaintiff had set up a false statement in that suit; that the question at issue was referred to panchayatdars before whom defendant made a statement that he had no concern in the suit; that at plaintiff's request the Court had in Original Suit No. 156 of 1899 decreed agreeably to an oath which was taken by one of the plaintiffs therein; and that the mesne profits decreed in that suit related to faslis 1306, 1307 and 1308, which were received and enjoyed by plaintiff alone. The only issues framed were whether the suit lay on the small cause side of the Court (the Munsif holding that it did) and whether defendant was bound to contribute. This issue the Munsif decided in favour of defendant. He said: "Defendant is not bound to contribute. He was the first defendant in Original Suit No. 156 of 1899; he left that case *ex parte*. That case was decided by the first plaintiff's special oath. The pleas raised in the original suit show that the present defendant had no interest in that case. The foundation of the action thus fails." He dismissed the suit, but without costs.

Plaintiff preferred this Civil Revision Petition, which came before Davies, J., who set aside the District Munsif's decree and passed a decree in plaintiff's favour on the ground that the District Munsif was wrong in going behind the decree which made the defendant jointly liable with plaintiff. He held that plaintiff was entitled to the contribution claimed.

Against this judgment defendant preferred this appeal under article 15 of the Letters Patent.

V. Krishnaswami Ayyar for appellant.

T. R. Venkatarama Sastri for respondent.

JUDGMENT.—In Original Suit No. 156 of 1899 a decree was passed jointly against the plaintiff and the defendant in the present suit directing them to deliver to the plaintiff in the former suit certain lands and to pay Rs. 43-15-10 on account of the profits of such land and Rs. 31-3-6 for costs of the suit. The defendant in the present suit did not appear and defend the former suit. In execution of the said decree the whole amount decreed with costs was recovered from the present plaintiff alone and he now sues the defendant for contribution and claims payment of Rs. 41-3-2 being one-half of the amount realized from

him. The defendant resists the claim on the following grounds:—

(1) That the decree in Original Suit No. 156 of 1899 was passed against him *ex parte*; (2) that he had no concern in that suit and that he appeared and stated so before certain Commissioners appointed in that suit under the Indian Oaths Act to administer a special form of oath to be taken by the plaintiff therein, by which oath the present plaintiff the second defendant therein agreed to be bound; (3) that the present plaintiff put forward a false contention in that suit; (4) that the decree was passed against both the defendants therein in accordance with the oath taken by the plaintiff therein; and (5) that the mesne profits decreed related to faslis 1306, 1307, 1308, and were received and enjoyed by plaintiff alone.

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Upon these pleadings and with reference to the pleadings and judgment in the former suit, the District Munsif held that the defendant was not bound to contribute and dismissed the suit. His decision seems to be based on the first, second and fourth pleas raised by the defendant as above set forth. The above decision of the District Munsif was set aside in revision by Davies, J., and a decree was passed in favour of the plaintiff as prayed for, on the ground that the District Munsif was wrong in going behind the decree which made the defendant jointly liable with the plaintiff, and that being so, the plaintiff was entitled to claim contribution from the defendant for the moiety.

In our opinion the plaintiff has made out a *prima facie* case by the production of the judgment in the former suit and of the certificate of satisfaction thereof by him alone. It is immaterial that, so far as the present defendant is concerned, it was passed against him *ex parte*, and it was not competent to the District Munsif to go behind the decree in that case and hold that the foundation of the present action fails because the former suit was decided by the special oath of the plaintiff therein and the pleadings in that suit show that the present defendant, who did not appear and defend that suit, had no interest in that case. Whether the judgment in that case was in fact and law right or wrong, it has become final and it is not now open to the defendant to contend that that suit ought to have been dismissed as against him and no decree ought to have been passed holding him jointly liable with the plaintiff. In a suit for contribution by one joint judgment-debtor against another, the decree passed

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against them jointly in the former suit is conclusive, not only as between them on the one hand and the decree-holder on the other (who is no party to the contribution suit), but also as between the judgment-debtors *inter se*. It is not conclusive on the question of the liability to contribute or the extent of such liability, but it is conclusive in the sense that it is not open to either party to contend that the former suit ought to have been entirely dismissed or that at any rate he ought not to have been held liable to the decree-holder therein or that the amount decreed was excessive or fixed on principles erroneous on the very face of the judgment. Without impugning the propriety of the judgment, it will, of course, be open to the party from whom contribution is sought, to plead and establish that as between the joint-debtors the plaintiff is solely liable to the debt or that he is not equally liable with the plaintiff or that both being joint tort-feasors in a sense in which, on public grounds, the right of contribution is negatived, the suit is not maintainable.

The fifth plea raised in this case might, if established, have been a valid defence to this suit. Though, in the former suit, both may have been rightly held jointly liable to the then plaintiff, yet, if as between the plaintiff and defendant herein, the former alone received or enjoyed the profits for fashis 1306, 1307, 1308, which were decreed in the former suit, the defendant cannot be called upon to contribute.

No plea having been raised against the maintainability of the suit on the ground that the plaintiff and defendant were joint tort-feasors it is unnecessary to consider how far the rule in the English case of *Merryweather v. Nixon*(1), which Lord Herschell in *Palmer v. W. and P. Steam Shipping Co* (2), felt bound to say did not appear to him "to be founded on any principle of justice or equity or even of public policy, which justifies its extension to the jurisprudence of other countries" should be followed in India or to consider the extent to which it has been limited in England by the subsequent cases of *Adamson v. Jarvis*(3), *Palmer v. W. and P. Steam Shipping Co.*(4) and *Burrows v. Rhodes and Jameson*(5).

(1) 5 T.R., 186.

(3) 4 Bing., 66.

(5) 22 (1) Q.B., 816.

(2) L.R., 1894, A.C., 318 at p. 324

(4) 1894, A.C., 318.

As regards the fifth plea, which, if established might, as already observed, be a valid defence to the suit, it is not alleged that any evidence was tendered or rejected.

The appeal therefore fails and is dismissed with costs

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PRIVY COUNCIL.

SUBRAMANIAN CHETTIAR (PLAINTIFF),

v

ARUNACHALAM CHETTIAR (DEFENDANT).

PC *
1902.
June 12, 13.
July 9.

[On appeal from the High Court of Judicature at Madras.]

Registration—Document collateral to a permanent lease of immoveable property—Registration Act—Act III of 1877, s 17—Transfer of Property Act—Act IV of 1882, s. 107—Evidence Act—Act I of 1872, s 92—Right of suit by assignee of agreement—Assignment of property to trustee—Construction of trust deed—Claims “now due owing or payable”

An agreement to pay Rs 500 a month to a lessor in consideration of receiving from him a permanent lease of portions of his zamindari, which agreement was come to before, but reduced to writing after, the execution of the lease, was held to be not affected by section 92 of the Evidence Act, nor to require registration either under the Registration Act, section 17, or the Transfer of Property Act, section 107, where it was not inconsistent with the lease, its provisions formed no part of the holding under the lease, the payment bargained for was no charge on the property, and it was not rent or recoverable as rent, but a mere personal obligation collateral to the lease

Held also, that the lessor's rights under the agreement did not pass under a settlement subsequently executed by him for the benefit of his son, by which he assigned to a trustee his zamindari with its incidents, and also “all the outstanding debts, arrears of rent, mesne profits, claims, demands, and sums of money of whatsoever description, now due owing or payable to the settlor on any account whatsoever, and all rights to prosecute any suit or other proceeding existing in favour of the settlor at the date of these presents . . . except and always reserving to the settlor all outstanding debts, arrears of rent and other claims and demands payable and to become payable to the settlor, and all rights to prosecute any suit or other proceedings now existing, etc.” The use in an Indian document of the words “now due owing or payable” in defining the claims transferred coupled with the words that follow restricting the transfer of rights of suit in respect of such claims to those existing at the date of the deed, showed that rights of the nature of those in the agreement, accruing as they did after the

* *Present.*—Lord Davey, Sir Ford North, Sir Andrew Scoble, and Sir Arthur Wilson.

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date of the trust deed, were not intended to pass under it, and this view was strengthened by the employment of the phrase "demands payable and to become payable" in the exception and reservation which followed.

Where, therefore, the lessor had, after execution of the trust deed, assigned his rights under the agreement :

Held, that the assignee could maintain a suit upon it to recover the amount due.

APPEAL from a decree (28th August 1900) of the High Court at Madras reversing a decree (15th October 1898) of the Subordinate Judge of Madura (East) which decreed the appellant's suit.

One Ramasami Chettiar, since deceased, the father of the present respondents, was about to take a permanent lease from the Raja of Ramnad of certain villages in the Ramnad zamindari. During the negotiations for the lease it was agreed, between Ramasami and the Raja that Ramasami should enter into an agreement to pay the Raja Rs. 500 a month for 10 years beginning with July 1895 with interest on any overdue instalment at 12 per cent. per annum. The reason for this arrangement was that the Raja had then in contemplation the settlement of his zamindari estate on his three minor sons for their benefit, and wished to reserve the payment of Rs. 500 a month for his personal and exclusive use.

On 4th July 1895, the Raja executed the proposed lease to Ramasami Chettiar, who, on the 5th July 1895, executed a counterpart of the lease to the Raja. This lease and counterpart were duly registered.

On 9th July 1895, the oral agreement as to the payment of Rs. 500 to the Raja was put into writing and duly executed, by Ramasami Chettiar and delivered to the Raja. This document is set out in their Lordships' judgment. It bore an endorsement by the Raja, dated 10th July, to the effect that it is "herewith sent to the Huzur Kacheri Treasury for safe custody. This amount relates to my own allowance : it does not relate to the allowance payable from the samasthanam." It was notified as having been received in the treasury on 15th July.

On 12th July 1895, the Raja, whose property was much encumbered, executed a duly registered deed, whereby for the protection of his sons' interests he assigned to Rao Bahadur Venkatarangayyar the whole of his zamindari (including the villages permanently leased to Ramasami Chettiar), and also land in the town of Madura on certain trusts therein specified.

The portions of this deed material to this appeal are set out in their Lordships' judgment

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On 9th December 1895, the Raja, in consideration of Rs. 30,000, assigned his rights under the agreement of 9th July 1895 to Ramanadhan Chettiar, the father of the plaintiff, with whom he was joint in estate, and due notice of the assignment was given to Ramasami Chettiar

Ramasami having failed to pay the instalments under the agreement as they fell due the present suit was, on 20th September 1897, brought by Ramanadhan Chettiar and Subramanian Chettiar against Ramasami and his sons, the present respondents, for Rs. 14,724, the amount of instalments then due with interest. The stipulation as to the payment of the sum of Rs. 60,000 payable in equal monthly instalments of Rs. 500 was stated in the plaint to be one of the terms of the lease agreed to before the execution of the lease along with the other terms of the lease; and it was further alleged that it was agreed that the said term of the lease was not to be embodied in the deed of lease.

The defendant admitted the execution of the lease and counterpart of 4th and 5th July, respectively, but denied that any agreement was made "at the same time" to the effect stated in the document of 9th July 1895. Amongst other defences he pleaded that the alleged agreement of 9th July was invalid for want of registration; that it was void for want of consideration, and was inadmissible in evidence; and even if valid and admissible the plaintiff had no right to sue upon it, as the Raja had, by the deed of 12th July 1895, assigned all his rights in his property to Venkatarangayyar, who, as trustee under that deed, was the only person who had a right to sue.

The Subordinate Judge overruled these grounds of defence and gave the plaintiff a decree for the relief prayed for.

The defendant appealed to the High Court, a Divisional Bench of which (SHEPARD and DAVIES JJ.) reversed the decree of the Subordinate Judge and dismissed the suit. They said:—

"In our opinion it is perfectly clear that the claim, whatever it may be, arising under the document, dated the 9th July 1895, did pass to the trustee under the trust deed executed on the 12th July. The general words used in the deed are large enough to include such a claim, and there is no reason whatever for restricting their operation. There is a clause by which the Raja reserves to himself certain property, but that clause does not include the present claim. It is

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said that by his note written on the 10th July, and kept by the Raja with the document of the 9th July, he indicated his intention to keep to himself the benefit accruing to him under the document. If that was the Raja's intention on the 10th July, all we can say is that he failed to give effect to it on the 12th July—and it is impossible to hold that the final trust deed then executed can be controlled by a mere memorandum such as we have here. The second point argued on behalf of the appellants is that the term expressed in the document sued on is one of the terms of the lease, and that it is only upon the lease that a suit can be brought to recover a sum which is in fact a part of the rent. In considering the point we must take it that the facts are as stated in the 3rd, 4th and 5th paragraphs of the plaint. The case is not one in which by a subsequent arrangement the tenant agrees to pay a further sum by way of rent. Here the stipulation to pay Rs. 500 a month is agreed upon as a term of the lease though, for some reason, it was not inserted in the instrument of lease. We think it amounts to an additional rent though payable in respect of a period prior to the date on which the lease is to take effect. The cases of subsequent agreement which have been cited have therefore no relevance. According to the Transfer of Property Act section 107, a lease such as was executed in the present case must be made by a registered instrument, and a lease is defined as a transfer of immoveable property for a certain time or for perpetuity in consideration of a price paid or promised. All the terms must necessarily be expressed in the registered document, and therefore any term not appearing therein, but written on a separate unregistered paper must be inoperative. To hold that part of the bargain regarding rent may be put in a separate paper and not registered would defeat the object of the Transfer of Property Act, which clearly is to have the whole transaction with all its terms expressed in a registered instrument. There is no ground for holding that the instrument is a sale and not a lease.

"The plaintiff was in such a position that he was compelled to allege that the stipulation was a term of the lease, for he would otherwise have been met with the difficulty of absence of consideration which is the case raised by the defendants. On both points we think the appellants succeed and therefore we allow the appeal and dismiss the suit with costs throughout."

On this appeal:

Mr. Cohen, K. C., and Mr. G. Branson, for the appellant, contended that the agreement of 9th July 1895 to pay the instalments of Rs. 500 a month was valid and binding on the respondents notwithstanding that it was unregistered. The High Court ought to have held that it was an agreement made in consideration of

the lease being granted to the respondent and was valid and binding before it was put into writing, and that it was collateral to the lease. The Evidence Act (I of 1872), section 92; the Transfer of Property Act (IV of 1882), sections 9, 10b, and 107; the Registration Act (III of 1877), section 17; *Lindley v. Lacey*(1); *Morgan v. Griffith*(2); *Martin v. Pycroft*(3); *Palmer v. Johnson*(4); and *Bank of New Zealand v. Simpson*(5) were referred to. They also contended that the Raja's claim in respect of the instalment of Rs. 500 a month did not pass to the trustee of the deed of 12th July 1895, but was validly vested in the appellant. It did not come within the words of the first part of clause 5 of the deed, as the instalments did not become payable until after the date of the deed; and it was reserved to the Raja by the reservation portion of that clause. *Biddle v. Bond*(6); *Rogers & Co. v. Lambert & Co.* (7) and *Farquharson Brothers v. King & Co* (8) were referred to.

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Mr J. D. Mayne, for the respondents, contended that the document of 9th July 1895 was invalid as being unregistered, and as having been made without consideration; and that it was inadmissible in evidence under section 92 of the Evidence Act (I of 1872). It required registration under section 107 of the Transfer of Property Act (IV of 1882). It was also invalid because all the rights purporting to be assigned by it had already passed to the trustee of the deed of 12th July 1895. They passed to the trustee under the words of clause 5 of the trust deed, and did not come within the things reserved to the Raja by the latter part of that clause.

Counsel for the appellant were not called on to reply.

On 9th July 1902, the judgment of their Lordships was delivered by Sir ARTHUR WILSON.

JUDGMENT.—The material facts of this case were not in dispute before their Lordships, and they can be briefly stated.

The Raja of Ramnad was the proprietor of the zamindari of the same name. On the 4th July 1895, he executed a reversionary lease of portions of his zamindari in favour of Ramasami Chettiar. The lease recited that there were subsisting leases affecting the properties demised, some of which would not expire till the fasli

(1) (1864) 34 L.J., C.P., 7 at p. 9.

(2) (1871) L.R., 6 Exch., 70.

(3) (1852) 2 De Gex Mac & Gor., 785.

(4) (1884) L.R., 13 Q.B.D., 351.

(5) (1900) L.R., A.C., 182 at p. 187.

(6) (1865) 34 L.J., Q.B., 187; 6 B. & S., 225.

(7) (1890), [1891] Q.B., 318.

(8) [1901] 2 K.B., 697.

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year 1318, corresponding to A.D. 1911. The new lease was accordingly made to commence with the fasli year 1319; it was expressed to be perpetual, the annual rent was fixed, its recovery, as well as that of road-cess and other charges, was provided for; and the rights and obligations of both parties defined. A counterpart of the lease was executed; and both lease and counterpart duly registered.

During the negotiations for the lease it was agreed between the Raja and Ramasami that, in consideration of his obtaining the lease, Ramasami should pay to the Raja a sum of Rs. 500 a month for a period of ten years from July 1895.

On the 9th July 1895, the arrangement with regard to the payment of Rs. 500 a month was put in writing in the form of a letter addressed by Ramasami to the Raja in the following terms:—

“Varthamana Kaduthasi

“Sivamayam (God everywhere)

“To M.R.Ry. BHASKARA SETHUPATHI MAHARAJAH Avergal

“Varthamana Kaduthasi (letter) written by A. L. A. R. Ramasami
Chetti of Devakottah.

“You have let to me on permanent lease on the 4th day of the current month of July, the villages of Kannangudi Vagaira Division for a sum which represents the average income of ten fashis together with one-eighth thereof. As agreed to by me to pay as consideration therefor, I shall pay you at the rate of five hundred rupees per mensem for ten years, that is, for one hundred and twenty months, (beginning) from July current. In default of payment in any one month, I shall pay the sum in respect of which default was made with interest at 1 per cent. per mensem from the date of default.

“(Signed on one anna stamp)

“THIRUVUFHARAKOSAMANGAI,

RAMASAMI CHETTI.

“9-7-95.”

On the 12th July, the letter was sent to the Huzur Treasury with a note that “it should be kept in the treasury for safe custody”; and on the 15th its receipt was registered.

On the 12th July 1895, the Raja executed a trust deed in which he recited that he was possessed of his zamindari subject to subsisting debts charges incumbrances and leases, and that he was desirous of making a settlement for the benefit of his heir apparent and elder minor son. The deed assigned to Venkatarangayyar as trustee (in paragraph 4) the zamindari with its incidents. In paragraph 5 he further assigned “all and singular the outstanding

debts arrears of rent mesne profits claims demands and sums of money of whatsoever kind or description now due owing or payable to the settlor on any account whatsoever and all rights to prosecute any suit or other proceeding existing in favour of the settlor at the date of these presents and also all monies hundies cheques currency notes or other securities for money now in the Huzur Treasury Office at Ramnad and in the several Taluk Treasuries in the said zamindari and also all securities for such debts arrears of rent mesne profits claims demands and sums of money as aforesaid or any of them and other documents in respect of the same respectively and also all other documents records correspondence and other papers now in the Record Office Huzur and Taluk Offices respectively in the said zamindari or which have been produced by or on behalf of the settlor or his agents officers clerks or servants in any public Office or Court in connection with any suit proceeding or matter and which relate in any wise to the said properties hereinbefore expressed to be hereby granted conveyed and assigned respectively or any of them and also all firearms and other weapons belts and badges now held or used by any peons or other servants of the settlor and also all furniture fixtures and other articles in the Huzur and Taluk Offices in the said zamindari and all the estate right title and interest claim and demand of him the settlor into and upon the same premises respectively hereinbefore expressed to be hereby granted conveyed and assigned respectively except and always reserving unto the settlor out of the said hereditaments and premises and the grant and assignment hereby made all those several Devasthanams Chatrams and Kattalais with their respective appurtenances situate in the said zamindari and now under the superintendence and control of the settlor and the lands and endowments of whatsoever description attached thereto respectively and situate in the said zamindari and all outstanding debts arrears of rent and other claims and demands payable and to become payable to the settlor in respect of the said Devasthanams Chatrams and Kattalais respectively (other than the Dharma Magamai and Jari Magamai payable in respect of Devasthanams and Charities) and reserving also unto the settlor all rights to prosecute any suit or other proceedings now existing in respect of the same and to or in which he is a party or is otherwise interested and also all moveable property in or about the buildings and premises erected and being on the said lands and premises firstly secondly thirdly and fourthly described in the said first schedule hereto and reserving also unto

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the settlor during his life the right at all times to reside with the members of his family in the several palaces and buildings comprised in the said lands and the zamindari and in the said premises described in the said first schedule hereto but without prejudice nevertheless to the right of the said Raja Rajeswara Dorai otherwise called Muthu Ramalinga Dorai or his heir to reside with the members of his family in all or any of the said palaces and buildings."

The trusts were declared, which included the payment of a monthly allowance to the Raja himself

No payments having been made by Ramasami in respect of his agreement to pay Rs 500 a month, the Rajah on the 9th December 1895 assigned that agreement for value to Ramanadhan Chettiar; and notice of this assignment was at once given to Ramasami.

On the 21st September 1897 the present suit was filed in the Court of the Subordinate Judge of Madura East by Ramanadhan Chettiar, since deceased, and his son Subramanian Chettiar, the present appellant, against Ramasami since deceased, and others who now represent him and who are the respondents. The claim was to recover twenty-six monthly instalments at the rate of Rs. 500 a month with interest

It is only necessary to refer to two grounds of defence. It was contended first that the original agreement for the payment of Rs. 500 a month was void in law as not being in writing registered, and that the plaintiffs were not entitled in law to prove the existence of such oral agreement. It was contended secondly that whatever right the Raja might have had under the agreement to pay him Rs. 500 a month had been transferred by him under the trust deed of the 12th July 1895, and that therefore neither Ramanadhan nor his representatives had any right to sue upon the agreement.

The Subordinate Judge decided in the plaintiff's favour upon both points and made a decree in accordance with the claim of the plaintiff. An appeal was filed in the High Court of Madras, and that Court reversed the decision of the lower Court and dismissed the suit, holding that both the grounds of defence were good in law.

With respect to the first of these questions, that going to the legal validity of the agreement for the payment of Rs. 500 a month, it is necessary to refer to certain of the terms of three Acts of the Indian Legislature.

Section 92 of the Evidence Act (I of 1872) enacts that :—
“ When the terms of any such contract, grant, or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument, or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.”

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The Registration Act (III of 1877), section 17, includes amongst the documents requiring registration, “ leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent ”

The Transfer of Property Act (IV of 1882), section 105, defines a lease thus :—“ A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.” And section 107 says that :—“ A lease of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.”

The agreement for the payment of Rs 500 a month for ten years from July 1895 is in no way inconsistent with the lease of the 4th of that month. Its provisions form no part of the terms of the holding under the lease ; their effect will be exhausted some years before the lease takes effect. The payment bargained for is no charge on the property ; it is not rent nor recoverable as rent, but a mere personal obligation collateral to the lease. Their Lordships are of opinion that the agreement is not affected by section 92 of the Evidence Act ; and that there is nothing in the Registration Act or in the Transfer of Property Act which required that it should be registered as part of the lease.

The second question is whether the respondents are right, in their contention, that the benefit of Ramasami's agreement to pay Rs. 500 a month to the Raja passed to the trustee under the trust deed of the 12th July, and that therefore the subsequent assignment to Ramanadhan was ineffectual, and that the plaintiffs in this suit had no right to sue. The answer to this question depends upon the construction to be placed upon the trust deed.

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The Rs. 500 a month not being rent, the right to it could not pass under the grant of the zamindari with its incidents contained in paragraph 4. But it was contended that the right was conveyed by the more general words of paragraph 5, by which the settlor assigned "the outstanding debts arrears of rent mesne profits claims demands and sums of money of whatsoever kind or description now due owing or payable to the settlor on any account whatsoever and all rights to prosecute any suit or other proceeding existing in favour of the settlor at the date of these presents" The use in an Indian document of the words "now due owing or payable" in defining the claims transferred, coupled with the words which follow restricting the transfer of rights of suits in respect of such claims to those existing at the date of the deed, appear to their Lordships to show that rights of the nature of that now under consideration, accruing after the date of the deed, were not intended to pass, a view which is somewhat strengthened by the employment of the phrase "demands payable and to become payable" in the exception and reservation which follows. And it appears to their Lordships that under the agreement between the Raja and Ramasami all the instalments now sued for accrued due after the date of the trust deed.

It was further suggested that the words in the same paragraph "all monies hundies cheques currency notes or other securities for money now in the Huzur Treasury Office at Ramnad" included Ramasami's letter of the 9th July, and that therefore the Raja's right to the Rs. 500 a month passed under the trust deed. As to this suggestion it is sufficient to say that there is no evidence that the letter in question was in the treasury when the deed was executed. All that appears is that on the 12th July, the day on which the trust deed was executed, but whether before or after the execution does not appear, the letter was sent to the treasury for safe custody, and that its receipt was recorded on the 15th.

Their Lordships will humbly advise His Majesty that the decree of the High Court be reversed with costs and that of the Subordinate Judge restored. The respondents will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Frank Richardson & Saüler.*

Solicitors for the respondents: Messrs. *Lawford, Waterhouse & Lawford.*

FULL BENCH.

*Before Sir Arnold White, Chief Justice, Mr. Justice Bhashyam
Ayyangar and Mr. Justice Moore.*

SHANMUGA MUDALY AND OTHERS (DEFENDANT AND HIS
REPRESENTATIVES), APPELLANTS,

1902.
August 8.

PALNATI KUPPU CHETTY (PLAINTIFF), RESPONDENT

*Rent Recovery Act—Act VII of 1865, s. 10—Suits to enforce acceptance of patta—
Necessity for tender of patta after judgment where patta originally tendered is
either upheld or amended*

Where a tenant has been ordered by a judgment passed under section 10 of the Rent Recovery Act to accept the patta which has been tendered to him, or such amended patta as the judgment declares ought to be offered to him, and to execute a muchilika in accordance with it, the tenant is not liable to be ejected under section 10 unless the landlord proves that within a reasonable time after the date of the judgment, not exceeding ten days therefrom, he tendered to the tenant the patta as approved, or as amended by the Court, and that the tenant did not accept the same and execute a muchilika before the expiration of the said period of ten days.

Court of Ward v Daimalinja (I L R, 8 Mad, 2), commented on

PETITIONS to eject tenants under section 10 of the Rent Recovery Act. In Second Appeals Nos 1095 and 1096 of 1900 plaintiff's pattas had been modified, and defendants agreed to accept the pattas so modified. Plaintiff filed these petitions complaining that defendants had not accepted the pattas within the time allowed and sought to obtain orders for their ejectment. Defendants appeared before the Head Assistant Collector and stated that they had been waiting until the landholder should amend the

* In Second Appeal No 1096 of 1900 the second appeal was preferred by the defendant Thandiaya Mudaly, the respondent being the plaintiff Palnati Kuppu Chetty. In Second Appeals Nos 1271 and 1272 of 1900 the plaintiff P. V. Krishnasamy Chettiar was appellant and the defendant Tuvengadatha Mudaliar respondent. Second Appeals Nos 1095 and 1096 were preferred against decrees of K. C. Minavedan Raju District Judge of North Arcot, in Appeal Suits Nos 89 and 90 of 1898 against the decisions of E. H. Wallace, Head Assistant Collector of North Arcot, in Summary Suits Nos. 1063 and 1070 of 1896. Second Appeals Nos 1271 and 1272 of 1900 were preferred against the decrees of A. C. Tate Acting District Judge of Chingleput, in Appeal Suits Nos. 45 and 46 against the orders of Mr. Sultan Mohideen, Deputy Collector of Tiruvallur division passed on Ejectment Petition No 29 of 1897 in Summary Suits Nos. 134 and 135 of 1897.

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pattas in conformity with the judgment The Head Assistant Collector held that the excuse was not sufficient, the judgment itself being equivalent to patta. He ordered warrants of ejectment to issue. An appeal was preferred to the District Judge, who dismissed it, following *Mahomed Yakub Sahib v. Mahomed Jaffer Ali Sahib*(1) on the ground that no appeal lay. This ruling was reversed by the High Court, following *Narasimhaswami v. Lakshmanamma*(2) and the applications were remanded to be dealt with according to law. The District Judge followed *The Court of Wards v. Darmalinga*(3), and upheld the decision of the lower Court that a fresh tender of the amended patta was unnecessary. The defendants preferred this appeal.

In Second Appeals Nos. 1271 and 1272 of 1900 defendant had been ordered to accept patta and execute muchilika to plaintiff. This he failed to do. Plaintiff thereupon filed a petition for ejectment. The Deputy Collector issued an order as prayed. On appeal, the then District Judge considered himself bound by *Mahomed Yakub Sahib v. Mahomed Jaffer Ali Sahib*(1), and dismissed the appeals, which were, however, remanded by the High Court for disposal, *Narasimhaswami v. Lakshmanamma*(2), being again followed. On the case coming again before the District Judge, it was not asserted that pattas had been tendered; but it was contended that the Deputy Collector's judgment was sufficient, and that no subsequent tender of patta was necessary. The District Judge held that as there had been no tender of patta subsequent to the *ex-parte* judgment there was no wilful default on the part of defendants. He set aside the order of ejectment. Against this order, plaintiff preferred this appeal.

Second Appeals Nos. 1095 and 1096 of 1900 came before Bhashyam Ayyangar and Moore, JJ, on 28th April 1902, when their Lordships made the following

ORDER OF REFERENCE TO THE FULL BENCH —In these cases the landlord brought a suit against the tenant under section 9 of the Rent Recovery Act to enforce the acceptance of a patta. The Head Assistant Collector of North Arcot considered that the patta tendered was not a proper one and, as required by section 10, he modified the terms of the patta and passed a

(1) I L.R., 4 Mad, 167.

(2) I.L.R., 22 Mad, 437.

(3) I.L.R., 8 Mad, 2.

judgment ordering the defendant to accept the patta as modified and to execute a muchilika in accordance with it. No patta having been accepted, nor muchilika executed, within ten days from the date of judgment, the landlord applied to the Head Assistant Collector and obtained an order for ejecting the tenant. The tenant appeared before the Head Assistant Collector and objected to the order applied for, on the ground that he was waiting until the landlord amended the patta in conformity with the judgment. The Head Assistant Collector, however, overruled the objection, holding that the excuse was not sufficient as the judgment itself was equivalent to the patta. Against this order the tenant preferred an appeal to the District Judge, and in support of his appeal he relied upon the decision of this Court in *Mahomed Yakub Sahib v. Mahomed Jaffir Ali Sahib*(1). In that case also a second appeal was preferred to the High Court against an order ejecting a tenant under section 10. While the High Court dismissed the appeal on the ground that no appeal lay from an order passed under section 10 of the Rent Recovery Act, it pointed out that "there is strong ground for the reasonable construction placed by the Collector on the term 'default,' viz, that it means 'wilful default' and not a default which may have been unavoidable." On behalf of the landlord reliance was placed upon the decision of this Court in *Court of Wards v. Darmalinga*(2), in which the question raised was whether a suit for the recovery of rent, which was brought against the tenant after judgment was given amending the patta which had been tendered by the landlord and directing the tenant to accept the patta as amended and execute a corresponding muchilika, could be maintained, notwithstanding that the landlord did not, after such judgment, tender a patta amended in accordance with the judgment. In deciding that such a suit was maintainable, Sir Charles Turner, C.J., and Muttusami Ayyar, J., held that the judgment itself was a "sufficient tender to entitle the landlord to enforce the terms of the patta" and "the law nowhere imposes on the landlord the obligation to make a tender after judgment, but that, on the other hand, it does declare the tenant liable to ouster if he fails to execute a muchilika within ten days from the date of the Collector's decision." The District Judge, considering himself bound by this expression of opinion, dismissed the appeal.

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(1) I.L.R., 4 Mad., 167.

(2) I.L.R., 8 Mad., 2.

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The case of *Mahomed Yakub Sahib v. Mahomed Jaffir Ali Sahib*(1) (which has been dissented from in *Narasimhaswami v Lakshamma*(2) in so far as it decided that an order of ejectment under section 10 was not appealable) does not appear to have been cited or considered in *Court of Wards v. Darmalinga*(3). Though the point actually decided in *Court of Wards v. Darmalinga*(3) was only that a suit for rent could be maintained, though there was no tender of patta after judgment, yet the reasoning on which it proceeds has generally been followed with reference to applications made by the landlord under section 10 for ejectment of the tenant. The forfeiture which a tenant incurs under section 10 is in the nature of a penalty and it is the interest of the landlord that the tenant should not accept the patta but incur such penalty by not accepting it and executing a corresponding muchilika. In our opinion a tenant does not incur such penalty unless the patta, as approved or amended by the Collector, is, after judgment, offered to the tenant by the landlord and the tenant does not then accept the same and execute a muchilika in terms of such patta. The section expressly provides that the order of ejectment is to be passed only on proof of the tenant's "default" in accepting the patta as approved or amended by the Collector and executing a muchilika in the terms of such patta. The acceptance of patta and the execution of muchilika here referred to is clearly subsequent to judgment, and it is impossible that a tenant can accept a patta which is not offered to him or execute a muchilika in accordance with a patta not offered to him. The onus of proving that a tenant has incurred a forfeiture of his holding under section 10, being clearly on the landlord, he ought in justice to prove the tender, subsequent to judgment, of the patta as approved or amended by the Collector. It is only if it is proved that the patta thus tendered is in accordance with the judgment of the Collector and that the tenant did not accept the same and execute a corresponding muchilika within the prescribed period of ten days that the Collector is warranted in passing an order for ejectment.

In our opinion the draft of the muchilika which the landlord claims that the tenant should execute, should also be tendered (*vide* section 261, Civil Procedure Code) to the tenant along with

(1) I.L.R., 4 Mad., 167.

(2) I.L.R., 22 Mad., 437.

(3) I.L.R., 8 Mad., 2.

the patta, and such tender ought to be made as early as practicable after the date of judgment so as to give the tenant reasonable time and opportunity to consider and comply with the landlord's demand before the expiration of the extremely short period of ten days prescribed by the Act, if the patta tendered and the draft of the muchilika are in accordance with the judgment. This we take to be the view taken in *Mahomed Yakub Sahib v. Mahomed Jaffir Ali Sahib*(1), and the construction there placed upon the word "default" occurring in the section.

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We may here point out that in cases in which the patta tendered is not approved by the Collector he ought not only to indicate in the judgment the nature of the amendments to be made in the patta, but he should actually incorporate in the judgment the exact form of such amendments, whether they consist of omissions, alterations or additions. Though the suit is simply for enforcing the acceptance of a patta, the judgment should invariably order the defendant not only to accept the patta as tendered or as modified, but also to execute a muchilika in accordance therewith—a direction very often omitted.

If the decision in *Court of Wards v. Darmalinga*(2) had been followed only in regard to suits for recovery of rent from the tenants, it would certainly have been productive of no hardship to the tenants, but would only have secured to the landlords the rents justly due to them. But when it is applied to cases in which the landlord seeks to enforce the extremely penal provision enacted by section 10 for the ejection of the tenants, it is certainly productive of serious and unmerited hardship to them when they are not guilty of any wilful default.

So far as the claim for rent is concerned, section 72 expressly provides that a judgment given for the delivery of a muchilika shall be evidence of the amount of rent claimable from the tenant, but only if the tenant required by the decree to execute the muchilika shall *refuse* to do so; and it also provides that in such a case the judgment or a copy of the judgment shall operate as a muchilika executed by the tenant. This provision confirms the interpretation we place upon the penal provision enacted by section 10 and is made to enable the landlord to recover the rent due to him notwithstanding that after judgment under section 10 the

(1) I.L.R., 4 Mad., 167

(2) I.L.R., 8 Mad., 2.

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tenant fails to accept the patta and execute a muchilika and thus incurs liability to forfeit his holding.

There being a conflict between the decisions of this Court in *Mahomed Yakub Sahib v. Mahomed Jaffir Ali Sahib*(1) and *Court of Wards v. Darmalinga*(2) and the question raised being one of great importance, we desire to refer the following question for the opinion of a Full Bench:—

“Whether a tenant who has been ordered by a judgment passed under section 10 of the Rent Recovery Act, to accept the patta which had been tendered to him or such a patta as the judgment declares ought to be offered to him and to execute a muchilika in accordance with it, is liable to be ejected under section 10 unless the landlord proves that within a reasonable time after the date of the judgment not exceeding ten days therefrom he tendered to the tenant the patta as approved or amended by the Collector and that the tenant did not accept the same and execute a muchilika in terms of the said patta before the expiration of the said period of ten days.”

Second Appeals Nos. 1271 and 1272 of 1900 came before Davies and Benson, JJ., on 30th April 1902, when their Lordships referred the same question to a Full Bench.

The cases came on for hearing in due course before the Full Bench constituted as above.

V. C. Seshachariar and *R. Kuppuswamy Ayyar* for appellants in S.As. Nos. 1095 and 1096 of 1900.

T. V. Seshagiri Ayyar for respondents.

P. R. Sundara Ayyar and *A. S. Balasubramania Ayyar* for appellants in S.As. Nos. 1271 and 1272 of 1900.

V. Viswanadha Sastri for respondents.

Sir ARNOLD WHITE, C.J.—*In Second Appeals Nos. 1095 and 1096 of 1900.*—The construction of the last paragraph of section 10 of the Rent Recovery Act, 1865, seems to me to be clear. The section enacts that if within a given period from the date of the Collector's judgment the defendant does not accept the patta as approved or amended the defendant may be ejected. The word “accepted” implies an offer and the use of the word “default” also shows that the Legislature intended there should be an offer as a condition precedent to an order for ejectment being obtained. In

(1) I.L.R., 4 Mad., 167.

(2) I.L.R., 8 Mad., 2.

the case of *Court of Wards v. Darmalinga*(1) the suit was for rent. I cannot adopt the view that the judgment of the Collector amending the patta constitutes a sufficient tender to entitle the landlord to eject the tenant and if the decision is to be regarded as an authority for this proposition, I respectfully dissent from it. The provision in section 10 is a penal one and ought to be construed strictly. It seems to me impossible to adopt the construction for which the plaintiff contends without doing violence to the express words of the section. The question of the right to eject when there had been no offer of the amended patta was not discussed in the case of *Munisami Naidu v. Perumal Reddi*(2). I think our answer to the question which has been referred to us should be in the negative.

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In Second Appeals Nos. 1271 and 1272 of 1900.—In these cases it was contended that where the Collector is of opinion that the patta is a proper one and passes a judgment directing the defendant to accept it, an offer of the patta after judgment is not a condition precedent to ejectment. The argument was that whatever may be the true view when the Collector is of opinion that the patta tendered is not a proper one and decides, under paragraph 4 of the section, what patta ought to be offered and passes a judgment ordering the defendant to accept it, when the Collector is of opinion that the patta is a proper one and passes a judgment, under paragraph 3 of the section, directing the defendant to accept it, the defendant is bound, as from the date of the judgment, to accept the patta which has already been offered to him and consequently no tender after judgment is required. I am certainly not disposed to apply this doctrine of constructive offer by relation back in construing the plain words of a penal enactment. The last paragraph of section 10 draws no distinction between a patta as "approved" and a patta as "amended" and I think the word "accepted" must be construed in both cases in the same way as indicating that an offer after judgment must be made by the landlord before he can eject.

I think our answer should be in the negative.

BHASHYAM AYYANGAR, J.—After a full consideration of the arguments advanced by the learned pleaders for the landlord in these cases, I see no reason to change the opinion which I have

(1) I.L.R., 8 Mad., 2.

(2) I.L.R., 23 Mad., 616.

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formed in the Order of Reference made in Second Appeals Nos. 1095 and 1096 I shall only notice the special arguments which have been advanced before the Full Bench.

The position taken on behalf of the landlord is that in a suit instituted under section 9 of the Rent Recovery Act, if the Collector be of opinion that the patta which had been tendered to the tenant is a proper one, it is not necessary under section 10 that the landlord should, after judgment, make a fresh tender of the patta but that the tenant should *suo motu* signify to the landlord his acceptance of the patta which had been tendered before suit but which he then did not accept, and should execute a muchilika in accordance therewith and that if he neglects to do so within ten days from the date of the Collector's judgment, the Collector is bound to eject him on application made to him by the landlord. If in such a suit the Collector should be of opinion that the patta which had been tendered is not a proper one, he should decide what patta ought to be offered by the landlord, but that even in such a case there need be no tender, after judgment, by the landlord, of a patta as settled by the Collector but that the judgment itself operates under section 72 as tender of such an amended patta and that if the tenant neglects for ten days to signify to the landlord his acceptance of the offer made by the judgment and to execute a muchilika in accordance therewith, the Collector shall pass an order for ejecting the tenant on application made to him by the landlord.

It is urged that the execution by the tenant of a muchilika in accordance with the terms of the patta as approved or amended by the Collector and the delivery of the same to the landlord will amount to an "acceptance" of the patta. In order to realise the full force of the argument, I put to the learned pleader for the landlord in Second Appeals No. 1271 and 1272 the specific question as to whether a tenant would incur a forfeiture of his holding under section 10 if, after judgment which approved of the patta tendered to him, he communicates to the landlord his acceptance of the terms of the patta and desires him to send him the patta, but the landlord does not do so and the tenant does not execute a muchilika and send the same to the landlord within ten days. His answer was that he would incur the forfeiture unless it could be shown that he could not possibly execute a muchilika by reason of his not having been furnished by the landlord with the patta.

It can scarcely ever be held that the tenant would not be in a position to deliver the muchilika by reason of the landlord not sending him the patta after judgment; for the patta which had been tendered or a copy thereof would of course be an exhibit in the suit and the judgment would show that it had been approved by the Collector. It in cases in which the Collector has not approved of the patta, but settled what it ought to be, the contention be upheld that the judgment itself operates as a tender of the patta as thus amended, it will follow that the landlord need not tender the tenant such an amended patta even if he applies to him for it. The argument therefore amounts to this, viz., that in no case need a landlord grant a patta to the tenant after judgment, even if the tenant applies to him for it, but that the tenant will be ejected if he fails to execute and deliver a proper muchilika within ten days from the date of judgment.

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The whole argument, in my opinion, proceeds upon a misapprehension of the scheme and policy of the Rent Recovery Act as to "pattas and muchilikas" and of the meaning of the word "accept" in section 10 of the Act. Pattas and muchilikas are documents, the former being executed by the landlord and the latter by the tenant which, at the option of the *landholder*, shall be a counter-part of the patta or a simple engagement to hold according to the terms of patta (*vide* section 4). The policy of the Act is that, as far as practicable, these documents should be exchanged between the landlord and the tenant unless both parties shall have agreed to dispense with them (section 7). If a tenant does not accept a patta and execute a muchilika, the landlord *tenders* to the tenant such a patta as he is bound to accept (*vide* section 7) and the tender is made by delivering a copy to the tenant or to some adult male member of his family at his usual place of abode or to his authorised agent or where such service cannot be effected, by affixing a copy of the patta on some conspicuous part of his last known residence or on some conspicuous part of the land to which it refers (*vide* section 39). Pattas and muchilikas should not be confounded with "proposal and acceptance" as they are understood in the Law of Contracts. Each is a formal record in writing of the terms of a *pre-existing* tenancy, whether such terms be the result of a contract or otherwise. Such documents as a general rule are exchanged annually, though they need not necessarily be for a term of one

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year only—in which latter case they need not be exchanged annually. The exchange of these documents necessarily implies that the tenant *receives* the patta and the landlord the muchilika and the provisions of section 10 are in furtherance of this policy of the Act by directing the tenant to accept the patta as approved or amended by the Collector and to deliver to the landlord a corresponding muchilika. If a fresh tender after judgment and acceptance of the patta so tendered were not intended by the Legislature the judgment would be only one directing the defendant to execute and deliver a muchilika in accordance with the patta as approved or amended by the judgment. There would really be no object in directing the defendant to “accept” the patta if such acceptance means his signifying to the landlord his acceptance of the *terms* of the patta which had been tendered to him before suit. When the judgment itself declared that the terms of the patta are binding upon the tenant, why should the Legislature require him to signify his assent thereto. The argument apparently proceeds on the supposition that the patta contains the terms of a proposal made by the landlord, that there is a continuing offer by the landlord of those proposals both before and after judgment and that the tenant fulfils the obligation imposed on him by the judgment by signifying to the landlord his acceptance of those *terms* and executing a muchilika in accordance therewith. The word “accept” in section 10 really means “receive” which, it will be seen, is the word used in section 8 when it refers to the grant by the landlord of “such a patta as his tenant was entitled to receive.” The tenant of course cannot receive a patta after judgment, unless the landlord then tenders it to him, whether such patta be the one which was tendered to him before the suit but was refused or a patta as amended by the Collector. He then executes a muchilika in accordance therewith and thus *exchange* of pattas and muchilikas is ensured at the risk of the tenant forfeiting his holding if he does not receive the patta and execute the muchilika within ten days from date of judgment.

The very definition of “muchilika,” viz., that it may be a counterpart of the patta or a simple engagement to hold according to the terms of the patta, at the option, not of the tenant, but of the landlord, is decisive of the question under consideration. If the landlord is not to stir in the matter after judgment had been given approving the patta as originally tendered or amending the same,

how is the tenant to know whether the muchilika to be executed by him is to be a counter-part of the patta or simply an engagement to hold according to the terms of the patta. Even if there was nothing in the section about the acceptance of a patta subsequent to judgment and if the judgment is to be one simply directing the defendant to execute a muchilika in accordance with the patta as approved or amended by the Collector, I should be prepared to hold that the landlord should tender a draft muchilika to the tenant within a reasonable time before the expiration of ten days and that if he does not do so, the tenant will not forfeit his holding by reason of his not executing and delivering a muchilika.

Section 72 in my opinion strongly supports the above interpretation of section 10. Its object is to enable the landlord to recover arrears of rent notwithstanding that the tenant has not accepted the patta subsequent to judgment, and executed a muchilika in accordance therewith and notwithstanding that he has thereby incurred a forfeiture of the holding. It declares that if the tenant refuses to execute the muchilika, the judgment shall be evidence of the amount of rent due by him and a certified copy of the judgment shall take effect as a muchilika executed by the tenant. Under section 10 the landlord has to tender the patta and the draft muchilika,—whether it be at his option a counter-part of the patta or a mere engagement to hold according to the terms of the patta—within a reasonable time before the expiration of ten days from the date of judgment and the “refusal” of a tenant to execute the muchilika referred to in section 72 is a refusal to execute the muchilika on requisition made by or on behalf of the landlord. The use of the word “*refusal*” clearly shows that it is not a case of mere “omission” or “neglect” on the part of the tenant without any *demand or requisition* on the part of the landlord. In the immediately preceding section 71 the corresponding phrase is “refuse or delay” in cases in which judgment has been given against a landlord for the delivery of a patta to a tenant. Whether or not for the purposes of realizing arrears of rent judgment given under section 10 alone constitutes under section 72 of the Rent Recovery Act a sufficient tender of the patta as amended by the Collector under section 10 as held in (*The Court of Wards v. Daimalnga*(1)), a point which does not arise for decision in these

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cases, there can be no doubt that under section 7 proceedings for the recovery of arrears of rent whether by a suit or by summary proceedings under the Act may be validly taken quite independently of sections 10 and 72 of the Act if the patta tendered to the tenant before the institution of a summary suit under section 9 was such as the tenant was bound to accept; if the same has been approved by the Collector under section 10 the landlord need not prove again in his suit or proceedings for the recovery of rent that the patta tendered by him was such as the tenant was bound to accept nor need he prove a further tender of patta after judgment.

I would therefore unhesitatingly answer the question referred to the Full Bench in the negative.

MOORE, J.—I concur. I have nothing to add to what has been set forth in the order of reference in Second Appeals Nos. 1095 and 1096 of 1900.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Boddam.

1901.
September 10.

KING-EMPEROR

v.

AYYA ANNASAMY AIYAR AND NINE OTHERS ACCUSED.*

Indian Penal Code—Act XLV of 1860, s. 143—Unlawful assembly—Defence by accused persons of property in their possession.

Paddy belonging to a society, to which the first accused belonged, was stored in a granary in a street. It was found as a fact that this paddy had been in the possession of the first accused for some time prior to 5th November 1899, and was in his possession on that date. Complainant, on 5th November 1899, attempted, as treasurer of the society, to forcibly take possession of the paddy with his servants, whereupon all the accused resisted him, and maintained the possession of the first accused, some blows being struck. On a charge being preferred against the accused for rioting

Held, that no offence had been committed.

* Criminal Revision Case No. 168 of 1901 under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of C. Hanumantha Row, First-class Sub-Divisional Magistrate of Tanjore division, in Calendar Case No. 8 of 1900.

CHARGE of rioting and theft against eighteen persons belonging to the village of Sulamangalam, Tanjore. The First-class Sub-Divisional Magistrate, before whom the accused were tried, discharged seven at an early stage of the case. The other eleven were convicted. The main facts of the case appear from the following judgment of the Sessions Judge at Tanjore, to whom the first accused, who was fined Rs 100, preferred an appeal :— "The theft is said to have been committed in respect of some paddy belonging to the Mahajana Sabha of the village to which the appellant belongs, and the rioting is said to have been committed when the complainant, who says he is the treasurer of the sabha, attempted to take possession of the paddy on 5th November 1899. The paddy was stored in the granary in the village street, and the Magistrate finds that the appellant, a member of the sabha, was in possession of it for some time before 5th November. There can be no doubt that this finding is correct. The evidence shows very clearly that, for some time before 5th November and on that date, the appellant was in possession and that he appointed two of his men to watch the paddy; one of his watchmen was at the place when the complainant went there and tried to take possession of the paddy. The ninth witness for the prosecution, one of the men who accompanied the complainant, says: 'Govindan (one of the two watchmen employed by the appellant) was at the receptacle when we went there. Govindan objected, but we did not listen to him. There was a big row between complainant and Govindan, hearing the noise of which, the other accused came.' The complainant, in spite of Govindan's remonstrances, climbed on to the top of the granary and opened it in order to take out the paddy. The appellant and others then arrived at the scene and the complainant was pulled down, and it is said that he received two blows. This, according to the evidence, is all that happened, and it appears to me that no offence was committed. The appellant, I consider, did no more than maintain his own possession, and use such force as was necessary to maintain it, and to resist the complainant's attempt to deprive him of that possession. He did not commit or abet the commission of theft or rioting. The finding and sentence of the Magistrate are reversed and the appellant is acquitted. The fine will be refunded." The complainant had, previously to the occurrence, sent a written notice to the first accused, in which he acknowledged that first accused was in possession of the paddy,

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and warned him that he would be held responsible for any damage that it might suffer. The Sabha had authorized the complainant to endeavour to remove the paddy peaceably, and directed him to resort to a Civil Court if he met with any resistance.

The remaining ten accused (who had been sentenced to pay fines of Rs 25 and under) preferred this criminal revision petition against their conviction.

Mr *D. Chamiar*, for petitioners, contended that the conviction was wrong, as the accused had only defended their possession. The person, who had attempted to "enforce a right or supposed right," was the complainant, who, as treasurer to the Sabha, endeavoured to take possession of the paddy which was in the possession of the first accused. Complainant, in his letter to first accused, acknowledged the possession of the latter, and the Magistrate found it as a fact. Complainant had attempted to take the paddy and the accused had prevented him, that is, they had defended their possession. This was not an offence under section 143, sub-section 4 of the Indian Penal Code. The offence defined in that section was the enforcement of a right, or the taking possession of property, by means of criminal force. A construction of the section as including a defence of possession of property or of a right would be inconsistent with the right of private defence of property which is permitted in section 97 of the same code. He referred to High Court Ruling, 10th August 1869(1), and to *Shunker Singh v. Burmah Mahto*(2). The conviction for theft could not be supported, as the evidence did not show conclusively that any paddy had been in fact removed by the accused, and even if it was removed, there was no criminal intent, the object of removal being to protect their possession of it.

The Public Prosecutor (Mr *E B Powell*) in support of the conviction, dealt with the facts and contended that the accused had been properly convicted.

JUDGMENT.—The First-class Sub-Divisional Magistrate found that the petitioners all acted in accordance with the directions of the first accused. He found that, before and at the time of the alleged offences, the first accused was in possession of the receptacle containing the paddy contributions and had appointed his own watchmen, two of whom are amongst the petitioners, and that the

(1) 4 M.H.C.B., App. 65.

(2) 23 W.R., (C.B.), 25.

complainant had sent a notice to the first accused, whereby he acknowledged the first accused's possession and stated that he would be held responsible for all damage. The Sabha only authorized the complainant to endeavour to remove the paddy peaceably and if he met with any resistance directed him to resort to a Civil Court. The complainant endeavoured to take possession of the paddy forcibly with his servants and the acts complained of were done by the first accused and the petitioners in resisting this attempt to take possession and in maintaining the possession of the first accused.

In the circumstances no offence was committed and the petitioners and the first accused should have been acquitted.

We set aside the convictions and acquit and discharge all the petitioners.

The fines, if paid, will be refunded.

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APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Moore.

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v.

ALEXANDER ALLAN (ACCUSED), RESPONDENT *

1901.
August 7.
October 18.

Madras District Municipalities Act—Act IV of 1884, s. 63 (3)—Madras District Municipalities Amendment Act—Act III of 1897, s. 19—“Lands used solely for agricultural purposes”—Liability to tax

By sub-section (3) of section 63 of the Madras District Municipalities Act, 1884, as amended by the Madras District Municipalities Amendment Act, 1897, lands used “solely for agricultural purposes” are exempted from the enhanced rates of taxation that may be imposed in certain cases under that sub-section.

Held, that lands on which potatoes, grain, vegetables, &c, are grown, as well as pasture lands, are used “solely for agricultural purposes” within the meaning of the sub-section.

APPEAL by the Public Prosecutor under section 417 of the Code of Criminal Procedure against an order of acquittal. The case had come before a Bench of Magistrates on a previous occasion when defendant was acquitted. An appeal was then preferred against

* Criminal appeal from an order of acquittal passed in Summary Case No. 848 of 1900 by a Bench of Magistrates at Ootacamund.

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that acquittal, when the High Court set aside the order of acquittal and remanded the case for trial, as there were questions which the Bench had left undecided (*Queen-Empress v. Allan*(1)).

The facts, which are more fully set out in the report of the previous case, were that the defendant objected to a demand made by the Ootacamund Municipality for land, water and drainage tax for the years 1897-98 and 1898-99, amounting to about Rs. 335 on lands which were admittedly not appurtenant to any building or attached thereto for any purpose, but which were held by defendant within municipal limits. The chief ground of objection was that the lands were used solely for agricultural purposes, and were consequently exempt from taxation by reason of the proviso to clause 3 of section 63 of the Madras District Municipalities Act of 1884 (Madras Act IV of 1884), as amended by the Madras District Municipalities Amendment Act of 1897 (Madras Act III of 1897). A statement containing a description of the lands was made by the Municipal overseer and filed as exhibit D, the correctness of which was not traversed by the defendant. In this, certain lands, over 44 acres in extent, were described as "waste." These were said by the defendant to be under grass—a statement which the prosecution did not deny. After considering the meaning and application of the term "agricultural purposes" the Bench found that 44·56 acres were let for cultivation, of which 35·05 were in actual cultivation, chiefly with potatoes and korali, a species of grain, one acre only was being used for growing market vegetables, and 9·51 acres were waste. They also found that four fields Nos. 117, 118, 119 and 120, aggregating 44·07 acres were "given for cattle grazing to Mrs. Reynolds." A majority held that the 44·56 acres let for cultivation as well as the 44·07 acres let for pasturage were lands used solely for agricultural purposes and were not liable to taxation. They accordingly acquitted the defendant under section 245 of the Code of Criminal Procedure.

Against that order of acquittal the Public Prosecutor preferred this appeal.

The Public Prosecutor for appellant.

Mr. W. Barton for respondent.

JUDGMENT.—This is an appeal preferred on behalf of Government from a judgment of the Bench of Magistrates in Ootacamund

(1) I.L.R., 24 Mad., 195.

acquitting the defendant Mr. Allan who had been prosecuted by the Municipality under section 103 of the Madras Municipalities Act (IV of 1884 as amended by Act III of 1897).

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The only question which has arisen for decision at the hearing of this appeal is as to whether all or any portion of the lands owned by Mr. Allan, the details as to which are given in exhibit D, should be held to be lands used solely for agricultural purposes and as such exempted from the enhanced rates of taxation that may be imposed in certain cases under section 63, sub-section 3 of the Madras Municipalities Act.

The expression "agricultural" is not defined in the Act. The only decisions of this Court to which our attention has been drawn in which an attempt has been made to define the word "agricultural" are that of *Kunhayen Haji v. Mayan*(1), where it was held that a lease of a coffee garden or a lease of certain coffee plants in a garden, for as to this the judgment is not very clear, is not an agricultural lease within the meaning of section 117 of the Transfer of Property Act and the judgment in Civil Revision Petition No. 337 of 1900 (*Murugesu Chetti v. Chinna-thambi Goundan*(2)) in which it has been decided that a lease of land for betel cultivation should be held to be an agricultural lease in so far as that section is concerned.

On referring to the Agricultural Rates Act (59 and 60 Vict., cap. 16) passed in 1896 for the purpose of exempting the occupiers of agricultural lands in England from paying as high rates on such lands as those levied on buildings and other hereditaments we observe (section 9) that "agricultural land" is there defined as follows:—The expression "agricultural land" means any land used as arable, meadow, or pasture ground only, cottage gardens exceeding one-quarter of an acre, market gardens, nursery grounds, orchards, or allotments, but does not include land occupied together with a house as a park, gardens other than as aforesaid pleasure grounds or any land kept or preserved mainly or exclusively for purposes of sport or recreation or land used as a race course.

We also find that in the Oxford English Dictionary edited by Dr. J. A. H. Murray, which is admitted to be the standard authority in such matters, agriculture is defined as follows:—"The

(1) I.L.R., 17 Mad., 98.

(2) I.L.R., 24 Mad., 421.

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science and art of cultivating the soil, including the allied pursuits of gathering in the crops and rearing livestock, tillage, husbandry, farming (in the widest sense)." We also note that it is there pointed out that the restriction of the word agriculture to tillage, as in the following quotation, is rare. The lands were not fields for agriculture but pastures for cattle. We believe that we cannot do better than follow these definitions in attempting to decide what, for the purposes of sub-section 3 of section 63 of the Municipalities Act, are or are not lands used solely for agricultural purposes. Referring again to exhibit D, we have no hesitation in holding that land on which potatoes, grain, vegetables, &c, are grown are lands used solely for agricultural purposes. We do not consider that any distinction can be drawn between large and small plots of lands on which roots or grain are cultivated. All such land must be held to be land used solely for agricultural purposes. We have next to consider the lands over 40 acres in extent entered in exhibit D as "waste." Mr. Barton, on behalf of Mr. Allan, has urged before us that these so-called waste lands are pasture lands and as such should be held to be lands used solely for agricultural purposes. Turning again to the definition of the word "agricultural" which we have accepted we find that agricultural lands include lands set apart as "pasture ground only" and also lands used for "rearing livestock." If, therefore, it could be shown that these so-called waste lands were in reality pasture grounds or lands used for rearing livestock, we should certainly decide that they were lands used solely for agricultural purposes. We cannot, however, hold on the evidence on the record that it has been shown that they are so used. All that we can find in the papers sent up bearing on the question as to how these lands are used is the following statement of the defendant Mr. Allan "Nos. 117, 118, 119 and 120 are in the occupation of Mrs. Reynolds; defendant receives no rent. Mrs. Reynolds pay the Government quit-rent; he uses it for grazing." If this is all the evidence that is forthcoming as to how the lands are used, we should most certainly hold that they are not pasture grounds "or lands used for rearing livestock." It is, however, urged by Mr. Barton that attention was not clearly drawn to this question when the case was before the Magistrates and that if opportunity be given to his client he will be able to put forward fuller and clearer evidence as to how this waste land is really

used. As it is most inadvisable that we should decide this question, which is one of some general importance, in a case in which all the evidence available as to the manner in which the lands are used is not on the record, we, under section 428 of the Criminal Procedure Code, send back the case to the Bench of Magistrates and direct them to take such further evidence as may be put forward by the Municipality and Mr. Allan as to the purposes for which the land shown in exhibit D as waste is used, the fullest details possible being given, and to submit the same for the consideration of this Court.

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The evidence of two witnesses, called for the defence, was taken by the Magistrates. This showed that the lands in question were used as pasture land.

The case again came before the same Bench, when the Court, after hearing the arguments of the same counsel, passed the following

JUDGMENT.—The further evidence shows clearly that the 44 acres odd regarding which we had some doubt are pasture lands and the learned Public Prosecutor does not dispute the fact. That being so it follows from the views we have already expressed that the land is used solely for agricultural purposes and is therefore exempt from taxation

The appeal is therefore dismissed.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Moore.

1901.
December 4

SEETAMRAJU KONDAL ROW (SECOND PLAINTIFF), APPELLANT,

v.

THE COLLECTOR OF GODAVARI ON BEHALF OF THE
SECRETARY OF STATE FOR INDIA (DEFENDANT), RESPONDENT.*

Indian Railway Act—Act IX of 1890, ss. 7, 10, 11—Compensation for damage caused by railway works—Suit to enforce construction of a channel to irrigate land—Maintainability.

Plaintiff alleged that the execution of certain works by a Railway Company, under section 7 of the Indian Railway Act, had interfered with his right to the flow of water to his land. He did not suggest that the Company had exceeded the powers conferred on them by that section, but claimed that they had failed to discharge the obligation, imposed by section 11 (b) of the Act, to make the necessary accommodation works, and sought a decision of the Court that such works should be executed.

Held, that he had no right of action. The effect of section 11 of the Indian Railway Act is that the opinion of the executive, with reference to the sufficiency of accommodation works, is final.

SUIT for a decree directing the defendant to construct a new channel for the purpose of irrigating plaintiff's land. The plaintiff alleged that, owing to the works made by the railway authorities, the usual flow of water from the Vatlur tank had been checked and that his land had in consequence been lying fallow. He claimed that a channel should be constructed to irrigate the land, and sought to recover the amount of profits which he had lost by reason of defendant's interference. The defendant admitted that some obstruction had been caused to the irrigation of plaintiff's land but pleaded that as soon as plaintiff had complained, the railway department had done all that he had required. He also alleged that a dam had been properly constructed for plaintiff in masonry and that he had offered to give any further relief that plaintiff might reasonably require but that plaintiff had not availed himself of that offer. He contended that, under section 10 (2) of the Indian Railway Act (IX of 1890), no suit lay for the

* Second Appeal No. 882 of 1900 against the decree of T. H. Munro, Acting District Judge of Godavari, in Appeal Suit No. 695 of 1899 confirming the decree of V. Lakshminarasimham, District Munsif of Ellore, in Original Suit No. 457 of 1898.

recovery of the compensation claimed. An issue having been framed on this point, the District Munsif said:—

"I am of opinion that this suit must fail. The suit for that portion which relates to compensation is not maintainable under article 2 of section 10 of the Railway Act (IX of 1890). Plaintiff's remedy must, in case of dispute, be determined on application to the Collector. Also, the other portion of the suit relating to the accommodation work is prohibited by section 41 of the Act. Section 11 of the Act lays down the procedure to be observed by the Railway Administration in regard to the works intended for the accommodation of the occupiers of lands adjoining the railway like plaintiff. If any owner or occupier feels dissatisfied with the works made for him, the only course open to him is to apply to the Railway Administration for such further accommodation works as he thinks necessary and are agreed to by that administration, or, in case of difference of opinion, as may be authorized by the Governor-General in Council. If the work done for him was really insufficient for the commodious use of plaintiff's land, he ought to have applied for further works instead of rashly proceeding to Court, especially in this matter in which the Collector deputed a subordinate to ascertain plaintiff's wishes (a fact not denied for plaintiff), but he did not avail himself of that opportunity, and he alleges his illness as an excuse. If he was really then ill, he might since have asked for the same as the Collector seems to have been inclined to attend to plaintiff's reasonable wishes." He dismissed the suit. Plaintiff appealed to the District Judge who dismissed the appeal.

Plaintiff preferred this second appeal.

P. Nagabhushnam for appellant.

The *Government Pleader* for respondent.

JUDGMENT.—The plaintiff apparently asks for a decree directing the defendants to construct a new channel for the purpose of irrigating his land. The Railway Company, in the execution of the works authorized by section 7 of the Indian Railway Act, have, the plaintiff alleges, interfered with his right to the flow of water to his land. It is not suggested that the Company acted beyond the powers conferred on them by section 7. If, as the result of the exercise of these powers, the plaintiff has sustained damage, he can recover compensation if he adopts the special procedure prescribed by section 10. The plaintiff, however, does

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not ask for compensation but says the Railway Company have failed to discharge the obligation imposed by section 11 (b) to make the necessary accommodation works and he asks the Court to decide that such works shall be executed. Under the English Railway Clauses Act 8 Vict., cap. 20, differences as to the sufficiency of accommodation works are decided by two Justices (see sections 69 and 70). But the wording of section 11 of the Indian Act makes it clear that the Indian Legislature intended that the opinion of the executive, with reference to the sufficiency of accommodation works, should be final.

We must hold the plaintiff has no right of action.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

1901.
December
12.

VENKATESWARULU (A MINOR, BY HIS FATHER AND GUARDIAN
MUKTALA VENKATACHALLAM) (COUNTER-PETITIONER),
APPELLANT,

v.

BRAHMARAVUTU RAJA KRISTNAJI AND THREE OTHERS
(PETITIONERS). RESPONDENTS.*

*Succession Certificate Act—Act VII of 1889, ss. 10, 19—Order extending certificate —
“Order granting a certificate”—Appeal.*

The extension of a certificate under section 10 of the Succession Certificate Act to additional debts is not the grant of a certificate so as to give a right of appeal under section 19 of that Act against the extension.

PETITION under the Succession Certificate Act (VII of 1889). Petitioners had already obtained a succession certificate to recover debts due to their late father. They now applied for an extension of that certificate to enable them to collect other debts. Counter-petitioner filed a petition opposing the application. The Acting District Judge passed an order granting the extension.

Against that order counter-petitioner preferred this appeal.

* Appeal No. 60 of 1901 against the order of J. H. Munro, Acting District Judge of Godavari, in Miscellaneous Petition No. 850 of 1900.

Mr. N. Subrahmaniam and R. Kuppusvami Aiyar for appellant,
V. Krishnasvami Aiyar for respondent.

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JUDGMENT.—The extension of a certificate under section 10 of Act VII of 1889 to additional debts is not the grant of a certificate so as to give a right of appeal under section 19 of the Act against the extension.

BRAHMA-
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The appeal is rejected with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

S. SUNDARAM AYYAR (PLAINTIFF), APPELLANT,
v.

1901.
October 29.
December 13.

THE MUNICIPAL COUNCIL OF MADURA AND THE
SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANTS), RESPONDENTS.*

Madras District Municipalities Act—Act IV of 1884 as amended by Act III of 1897, s. 3, cl. 27—"Street"—Effect of vesting in Municipality—Obstruction by owner of property abutting on street—Suit for injunction to prevent interference by Municipality—Limitation Act—Act XV of 1877, sched. II, art. 146-A.

When a street is vested in a Municipal Council, such vesting does not transfer to the Municipal authority the rights of the owner in the site or soil over which the street exists. It does not own the soil from the centre of the earth *usque ad cælum*, but it has the exclusive right to manage and control the surface of the soil and so much of the soil below and of the space above the surface as is necessary to enable it to adequately maintain the street as a street. It has also a certain property in the soil of the street which would enable it as owner to bring a possessory action against trespassers.

The effect of article 146-A of schedule II to the Limitation Act considered.

Municipal Commissioners for the City of Madras v. Sarangapani Moodaliar, (I.L.R., 19 Mad., 154), commented on.

SUIT for an injunction. The facts and the contentions raised are set out in the judgment of Bhashyam Ayyangar, J.

P. S. Sivasvami Aiyar and T. R. Venkatarama Sastri for appellant (plaintiff).

C. Sankaran Nair for respondents (defendants).

* Second Appeal No. 793 of 1900 against the decree of T. M. Runga Chariar, Subordinate Judge of Madura (West), in Appeal Suit No. 450 of 1899 against the decree of A. Narayanan Nambiyar, District Munsif of Madura, in Original Suit No. 693 of 1898.

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BHASHYAM AYYANGAR, J.—In the plaint, the plaintiff claims as owner three items of property, each of which he describes as a plot of certain dimensions with the granite pial built thereon, immediately to the east of his dwelling house and to the west of the street and prays that a permanent injunction may be issued restraining the defendant (the Municipal Council of Madura) “from interfering with or from causing obstruction to the plaint sites, from removing the granite pials built on the plaint sites or from taking any steps to remove the same.”

The defendant, in his written statement, states that the slab-stones, which the plaintiff was required to remove, have been only recently put up, that as the defendant has all along been using the drain below the slab-stone the plaintiff cannot acquire any prescriptive right against the defendant, that the construction in question, being admittedly a projection over the drain in front of plaintiff's house, the defendant has every right to remove the same under section 168 of Act IV of 1884 (as amended by Act III of 1897) and that as the defendant is only carrying out the orders of the Local Government in removing the slab-stones, with a view to introducing a drainage scheme for the whole town, the plaintiff is not entitled to the injunction prayed for

Issues were framed as to whether the plaintiff has acquired any and what right in the said pial and whether it was competent for the defendant to remove the pial and whether the plaintiff was entitled to the injunction sought for. The District Munsif finds that the pial has been in existence for the last thirty years at least, that it does not in any way interfere with the cleaning of the drain under it and that the pial also projects a little into the street beyond the drain and that the plaintiff having acquired a right by adverse possession is entitled to the injunction sought for. The District Munsif, in meeting certain arguments advanced on behalf of the defendant, observes that the ground over which the pial is built forms portion of the street and that the public could not use such portion for any purpose, that though there is a drain under the pial in a portion of it, the “major portion of it is ground” and that the plaintiff does not claim any right over the drain and “the question is with regard to the land.”

The Municipality preferred an appeal to the Subordinate Judge of Madura (West) and the third ground in the memorandum of appeal runs as follows:—“The Lower Court is wrong in describing

the slab-stones put up as a pial and in holding that the major portion of it is ground." The Subordinate Judge, differing from the District Munsif's view that the plaintiff has acquired title by adverse possession, reversed his decree and dismissed the plaintiff's suit. The chief ground on which his judgment is based seems to be that plaintiff's possession of the pavement has simply been permissive, as is shown by the fact of his having asked leave of the Municipality in 1892 for substituting slab-stones in place of brickwork on the pial and the Municipality, as then advised, having accorded such permission, as also by the fact of the Municipality having all along had the control of the drain underneath the pial. The Subordinate Judge in his judgment makes the following observations as to the plaintiff's case:—"In the site occupied by the pial and the drain plaintiff claims no title, but he claims to be owner of it by adverse possession as against the Municipality.

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Plaintiff, it will be seen, does not claim the site in question as his private property; it is part of the street; according to the definition of the word "street" in the new Act the drains form part of the street."

This second appeal is preferred by the plaintiff against the decree of the Subordinate Judge and the chief contention relied upon in support of the appeal is that upon the facts found by him the Subordinate Judge ought to have held that the plaintiff acquired a title by prescription, that after he has acquired such title the construction cannot be regarded as an encroachment or continuing wrong, and that the Subordinate Judge has misconstrued the application made by the plaintiff to the Municipality in 1892 (for permission to substitute stone-slabs in place of brickwork on the pial) in holding that his occupation of the pial was only permissive and not as of right. The appellant's pleader explains that the so-called pial in question is a projection from the main wall of the house over the municipal drain and partly over the road or highway adjoining the drain, and that the projection rests upon masonry pillars standing on the road. There is no evidence or plan on record showing exactly the nature and dimensions of the pial in question, as also of the drain, and the extent of the road covered by the pial and the number and dimensions of the pillars on the road, supporting the pial, nor is there any evidence to show whether the pial is an open one or covered by roof, thatched or of masonry work.

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Though the District Munsif rests the plaintiff's claim solely on title by prescription and the Subordinate Judge states in his judgment that the plaintiff "does not claim the site in question as his private property," a reference to the plaint shows that the plaintiff does claim the pial in question with the site thereunder, as belonging to him with his house, subject only to the defendant's right to the drain underneath the pial. The Courts below and the parties to the suit have proceeded on the assumption and footing that the statutory vesting of streets and drains in a Municipality has the effect of vesting in the Municipality the ownership of the land over which the streets and drains are formed and it is apparently on that footing that the learned pleader for the appellant contends before us that his client has acquired title by prescription. This, no doubt, would be so, if the land itself had been acquired by the Municipality, either by purchase or otherwise and roads and drains formed thereon (section 158 of Act IV of 1884). But if the street or highway over the land was dedicated to the public either by the State or by the owners of the land adjoining the highway or by any other person, the ownership in the soil of the street or highway will continue vested, subject only to the burden of the highway, in the State or the respective owners of the land on either side of the highway, *ad medium flum*, or in any other person who may have dedicated the street to the public as the case may be.

The first question, therefore, which has to be determined, is the nature of the right, title and interest vested in the Municipality, by the District Municipalities Act, in respect of public streets and drains, and this question has to be determined chiefly with reference to English decisions. In *Orr Ewing v. Colquhoun*(1) Lord Hatherley, speaking of the *Leven*, a navigable but non-tidal river, says (at p. 846): "There are two totally distinct and different things—the one is the right of property, and the other is the right of navigation; the right of navigation is simply a right of way" and Lord Blackburn (at p. 854) states that "the public, who have acquired by user, a right of way on land, or a right of navigation on an inland water, have no right of property. They have a right to pass as fully and freely, and as safely as they have been wont to do." In the case of *Galbraith v.*

(1) L.R., 2 A.C., 839.

Armour(1) in the House of Lords, Lord Campbell said. "I must express my clear opinion that by the law of Scotland as well as by the law of England the soil of public highways is presumed to be in the conterminous proprietors ; and that, if a public highway is established by usage, over the land of another, the soil is still his, with all his former rights, subject to the public servitude which he has suffered to be established." It will thus be seen that the right of the public to the use of land, as a highway, is not regarded as in the nature of property or proprietary right and in the General Highway Act, 1835 (5 and 6 Wm. IV, C 50) the management of highways was practically placed in the hands of the parish surveyor or the district surveyor as the case might be. That functionary had no right in roads beyond mere rights of control and management and both the property in the road and the possessory rights in respect thereof, subject of course to the right of passage on behalf of all the King's subjects, were vested entirely in the persons or the successors of the persons who had originally granted the right of passage to the public. But in passing the Metropolis Local Management Act, 1855, the Legislature considered that, in order to enable local bodies and authorities to execute their functions properly in regard to the management of highways, it was necessary to give to them some further powers and greater rights than those which had been originally possessed, under the General Highway Act, by the surveyor of highways, and the object was carried out by giving to them over and above the easement of passage which the public had and which they might be able to enforce as representing the public and over and above the rights of control and management to which they would succeed as invested with the functions of the old surveyor of highways, some right of property in the soil or a portion of the soil of the street (per Thesiger, L.J., in *Rolls v. Vestry of St. George*(2)). The same course was also adopted by the Indian Legislature. Under Act XXVI of 1850, which was the first enactment of the kind applicable to this Presidency, power was given to extend the provisions of the Act to any town in the Presidency in view to "making better provision for making, repairing, cleaning, lighting or watching any public streets, roads, drains or tanks or for the prevention of nuisances." The Act did

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(1) 4 Bell's App, 374.

(2) L.R., 14 Ch.D. at p. 801.

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not vest in the Commissioners to be appointed thereunder, any property in the public streets, roads, &c. Whether or not the provisions of this Act were applied to Madura does not appear. But when Act X of 1865 was passed, streets and roads were, as in the case of the English Metropolis Local Management Act of 1855, vested in the Municipal Commissioners as 'public highways' (not being the property of and repaired by and kept under the control of the Government and not being private property) together with the pavements, stones and other materials thereof and also all erections, materials, implements and other things provided for such highways (Madras Act X of 1865, section 11). Act X of 1865 was superseded by Act III of 1871 and all public streets in any town to which this Act was applied, were vested with their appurtenances in the Municipal Commissioners (section 13). This again was superseded by Act IV of 1884 and all public streets with their appurtenances were vested in the Municipal Council by section 23 and also sewers and drains, &c, by section 24.

Under Act III of 1897, amending Act IV of 1884, the definition of "street" (section 3, clause 27) was amended by including in the term "street," the drains on either side. The parenthetical phrase "not being private property" next after the words "with the land" were omitted and the reference to the "main wall of any house adjacent to the street" was superseded by reference to "the boundaries of the adjacent property." The object of including drains in the definition of "street," is by no means obvious, seeing that section 24, vesting sewers, drains, &c, in the Municipal Council is retained. The omission of the parenthetical clause "not being private property" does not, in my opinion, really enlarge the definition of "street" inasmuch as the expression "adjacent property" in the new phrase "up to the boundaries of the adjacent property" will comprise "private property" though it may project beyond the actual building. Why the reference to such a distinct mark as the main wall of a house has been omitted, even when, as is usually the case, the houses adjoin the street, is not apparent. There is, therefore, really no force in the argument advanced on behalf of the respondent that the amendment made by Act III of 1897 has the effect of enlarging the definition of "street" so as to include therein even private property lying between the roadway and the main wall of the house. It becomes, therefore, unnecessary to consider whether such property, even if

it has now become, by virtue of the Amendment Act III of 1897, part of the "street," could vest in the Municipality, in whom is vested only "a public street" which is defined as denoting only "any street which is now vested in the Municipal Council or which may hereafter be made at the cost of the Municipal fund or which may hereafter be declared under section 163 to be a public street" (Act III of 1897, section 3, clause 28).

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I shall now refer to some of the principal English cases in which the question of the extent of property and the nature of the right, title and interest possessed by urban authorities in streets vested in them under the Metropolis Local Management Act, 1855, the Public Health Act, 1875, and similar enactments, were considered and settled. The leading case in which the question first presented itself for consideration in the Court of Appeal is *Coverdale v Charlton*(1). In that case it was held that by force of section 149 of the Public Health Act, 1875, which vested all streets in the local board and under its control, the property in the soil of the street so far vested in the local board that they could demise the right of pasturage thereon to the plaintiff Bramwell, L.J., at pages 116-118, says: "I am disposed to hold that this 'street' vests without any property in the freehold of the soil. The word 'vest' may have two meanings. It may mean that a man acquires the property '*usque ad coelum*' and to the centre of the earth but I do not think that to be its meaning here. One construction of the word 'vest' here is that it gives the property in the soil, the freehold, the surface and all above and below it; but that would be such a monstrous thing to say to be necessary for the proper control of the streets by the local board, that I cannot suppose it to mean such a thing. Suppose the soil of the freehold passes, and consequently it carries the right to the land to an indefinite extent upwards and to the centre of the earth below the surface; I cannot make up my mind to say that is the meaning of the word 'vest' in section 149. . . . What then is the meaning of the word 'vest' in this section? The Legislature might have used the expression 'transferred' or 'conveyed,' but they have used the word 'vest'. The meaning I should like to put upon it is that the street vests in the local board *quâ* street; not that any soil or any right to the soil or surface vests, but that

(1) L.R., 4 Q.B.D., 104.

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it vests *quâ* street The meaning I put upon the word 'vest' is, the space and the street itself, so far as it is ordinarily used in the way that streets are used, shall vest in the local board That would show that 'street' comprehends what we may call the surface, that is to say, not a surface bit of no reasonable thickness, but a surface of such a thickness as the local board may require for the purposes of doing to the street that which is necessary to it as a street and also of doing those things which commonly are done, in or under the streets; and to that extent they had a property in it."

Brett, L.J., says (at page 121) :—" 'Street' means more than the surface, it means the whole surface and so much of the depth, as is or can be used not unfairly, for the ordinary purposes of a street. It comprises a depth which enables the urban authority to do that which is done in every street, namely, to raise the street, and to lay down sewers, for at the present day there can be no street in a town without sewers, and also for the purpose of laying down gas and water-pipes If the enactment gives the local board that property in so much of the land, it gives them the absolute property in everything growing on the surface of the land. The Legislature have, because the right of the owners to the soil in a 'street' is of so little value, intentionally taken away that right and have given it to the extent I have mentioned to the local board." At page 126 Cotton, L.J., in concurrence with his colleagues says "Therefore, on the true construction of this Act of Parliament, the meaning to be given to the words 'vest in' must be 'passed to and vested in' the local board; it is sufficient in the present case to say that the street and the surface vested in the local board some property in the soil for the purpose for which it was to be used and in my opinion I must hold that the 'street' is a material thing, and that under this clause, it vests in the local board."

James, L.J., explained the principal of the above decision as follows in *Rolls v. Vestry of St. George*(1). "What that case decided, and all that was necessary to decide in that case, was that something more than an easement passed to the local board, and that they had some right of property in and on and in respect of the soil which would enable them as owners to bring a possessory

(1) L R., 14 Ch D at pp 795, 796

action against trespassers. Now, what was that something more? S. SUNDARAM
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It is impossible to read any of the three judgments delivered on that occasion without seeing that in the view of the learned Judges, the soil and freehold in the ordinary sense of the words 'soil and freehold,' that is to say, the soil from the centre of the earth up to an unlimited extent into space, did not pass, and that no *stratum* or portion of the soil, defined or ascertainable like a vein of coal or *stratum* of ironstone, or anything of that kind passed, but that the board had only the surface, and with the surface, such right below the surface as was essential to the maintenance, and occupation, and exclusive possession of the street and the making and maintaining the street for the use of the public."

In *The Mayor of Tunbridge Wells v. Baird*(1), the House of Lords, affirming the decision of the Court of Appeal(2) held, with reference to section 149 of the Public Health Act, 1875, vesting certain streets in the urban authorities, that it had not the effect of vesting the sub-soil in the urban authority and that therefore where a Local Act authorised the urban authority to erect and maintain "in any street or public place" lavatories for the use of the public, the urban authority had no power to excavate the soil and erect lavatories below the surface of a street which had vested in them Lord Halsbury (at page 437) says: "That the street should be vested in them as well as under their control may be, I suppose, explained by the idea that, as James, L.J., points out, it was necessary to give, in a certain sense, a right of property in order to give efficient control over the street. It was thought convenient, I presume, that there should be something more than a mere easement conferred upon the local authority, so that the complete vindication of the rights of the public should be preserved by the local authority; and therefore there was given to them an actual property in the street and the materials thereof It is intelligible enough that Parliament should have vested the street *quâ* street and, indeed, so much of the actual soil of the street as might be necessary for the purpose of preserving and maintaining and using it as a street." Referring to the case of *Coverdale v. Charlton*(3), he observes (at page 439) "Lord Bramwell is reported to have said that it would be a reasonable construction of the statute to suppose, not that the soil of the freehold had been

(1) L R., [1896], A C, 434.

(2) L R., [1894], 2 Q B., 867.

(3) L R., 4 Q.B.D., 104.

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given in the sense which I have described, but only so much that the street should be used as a street; and then his Lordship is also credited with the observation that the local authority would have authority to do such things as are commonly done in or under a street. My Lords, I think, if his Lordship did use those words, he could not have had in his mind such a question as is now before your Lordships, because, if so, it would really be inconsistent with the rest of his judgment. 'What is commonly done in a street' may include water-pipes and gas-pipes as well as sewers, and it could not be supposed that any such power was intended to be conveyed by such language. I think what his Lordship must have meant was such things as are usually done in a street, for the purpose, as he elsewhere in his judgment describes it, of maintaining it as a street, and which are incident to the repair and maintenance of the street as a street. For that purpose it would be intelligible. For any other purpose, it would appear to me to be inconsistent with the language of the enactments, and contrary altogether to the policy which the Legislature has certainly always pursued, of not taking private rights without compensation. In circumstances in which it is essential to take private property, Parliament has always provided for compensation, and in this section the language itself imports that where private property is being dealt with, it can only be done 'with the consent of the owner.' "

Lord Herschell (at pages 440, 441) says: "The learned counsel for the appellants have contended that it has been established by decision that if a street has so vested, the soil below the street at all events to the depth necessary for the construction of sewers, has vested in the urban authority and that they have not gone below that depth. The case relied on and the only case I think which can be called a decision, although I do not think that word is accurate even as regards that case, is *Cloverdale v. Charlton*. All that had to be determined in that case was whether the vesting of a street gave the urban authority power to let the pasturage on the surface: it was not necessary to decide anything more than that. If sufficient property vested for that purpose, then there was a good demise on the part of the urban authority. But no doubt the opinion was expressed there that the vesting of the street would carry something more than the mere surface and that in addition to what was necessary for its maintenance as a

highway, there would be transferred to the urban authority soil below that sufficient for all the ordinary uses of land below a highway. My Lords, I confess I see considerable difficulty in accepting any such view. In the first place the language of the enactment seems to me to point in a contrary direction. Section 149 vests 'all streets' being or becoming highways repairable by the inhabitants at large 'and the pavement and stones and other materials thereof' All that seems to point to the surface use of the street and nothing more, and I am unable to see why it should be supposed to transfer to and vest in the urban authority the sub-soil below for sewerage purposes, because that is provided for, and amply provided for, by other provisions in the same statute." "By section 13 'all existing and future sewers' are 'vested in' and placed 'under the control' of the local authority in precisely the same language as the streets are in the section now under consideration. What necessity, therefore, is there for transferring, by a clause vesting the streets, the soil under the street, in which the sewers are, when the sewers themselves are, with certain exceptions which it is unnecessary to go into, vested in the local authority?" . . . And at page 442 "My Lords, it seems to me that the vesting of the streets vests in the urban authority such property and such property only as is necessary for the control, protection and maintenance of the street as a highway for public use." Lord Macnaghten (at page 442) concurred in this opinion and desired only to add that "the meaning of section 149 of the Public Health Act, 1875, is to give to the urban sanitary authority the control and management of the streets coming within the description therein contained and such statutory right in the nature of a right of property as may be sufficient to authorise them to sue and be sued as occasion may require in the course of such control and management."

This decision was followed and applied by the Court of Appeal in a case arising under section 96 of the Metropolis Local Management Act, 1855 (*Battersea Vestry v County of London, etc., Electric Lighting Company*(1)). In that case, an electric lighting company, the defendant, had illegally broken up the surface of a street within the district of a vestry in the metropolis and placed their pipes and wires at a depth of about 2 feet below the surface. It was held

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(1) [1899], 1 Ch, 474.

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that the vestry were not, by virtue of section 96, the owners of the soil of the street at that depth and that although the defendant company had acted illegally in breaking up the street, the vestry could not maintain an action for a mandatory injunction to compel the company to remove their pipes and wires, there being no continuing trespass upon, or interference with, any rights of the vestry. In the *Municipal Council of Sydney v. Young*(1) which came on appeal before the Privy Council from the Supreme Court of New South Wales, it was held that the Sydney Corporation Act of 1879, which vests public ways in the Municipal Council, does not so vest them in proprietary right which alone gives claim for compensation, but only for purposes incidental to the exercise of municipal authority. Lord Morris in delivering the judgment of their Lordships of the Privy Council (at page 459) says, "Now it has been settled by repeated authorities, which were referred to by the learned Chief Justice, that the vesting of a street or public way vests no property in the municipality. beyond the surface of the street and such portion as may be absolutely necessarily incidental to the repairing and proper management of the street, but it does not vest the soil or the land in them as owners. If that be so, the only claim they could make would be for the surface of the street, as being merely property vested in them *quâ* street, and not as general property."

Though the principle of the decision in *Coverdale v. Charlton*(2) in so far as it lays down that some kind of property in the street is vested in the urban authority, is not shaken by the decisions above referred to, yet its authority as to the nature and extent of such property is considerably shaken. The conclusion to be drawn from the English case-law is that what is vested in urban authorities under statutes similar to the District Municipalities Act, is not the land over which the street is formed, but the street *quâ* street and that the property in the street thus vested in a Municipal Council is not general property or a species of property known to the Common Law, but a special property created by statute and vested in a corporate body for public purposes, that such property as it has in the street continues only so long as the street is a highway and that when it ceases to be a highway, by being excluded by notification of Government under section 23 of

(1) L.R., [1898], A.C., 457.

(2) L.R., 4 Q.B.D., 104.

Act IV of 1884 or by being legally stopped up or diverted, or by the operation of the law of limitation (assuming that by such operation the highway can be extinguished), the interest of the corporate body determines; and that the clauses directing or authorising the corporate body to sell, have reference only to property absolutely vested in it, but as to property in which its interest ceases it has nothing to sell (*Rolls v. Vestry of St. George*(1)).

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In connection with the vesting of streets in urban authorities I may here refer also to two other cases (*Wandsworth Board of Works v. United Telephone Company*(2) and *Lord Provost of Glasgow v Glasgow and S.W. Railway Company*(3)) which bear upon the extent to which the urban authority has a right in the air space over the surface of a street, and below and beside a bridge over which the street was carried. In regard to the drain which is also vested in the municipality, the extent of air space above the drain to which the Municipal Council may be entitled will not be the same as in the case of the street (*Mayor of Birkenhead v. I. and N.W. Railway Company*(4)).

Turning now to Indian cases, in the *Chairman of the Nuihati Municipality v. Kishori Lal Goswami*(5) it was held that the vesting of roads in a municipal corporation by Bengal Act V of 1876, section 32, did not pass to the municipality the soil beneath the roads. In *Madhu Sudhun Kundu v. Pramoda Nath Roy*(6) the same view was taken with regard to the operation of section 10 of Bengal Act III of 1864 and it was held that it does not deprive any person of any right of private property that he may have in land used as a public road and that it does not vest the subsoil of the land in a municipality. The decision of the Allahabad High Court in *Nihal Chand v. Azmat Ali Khan*(7) proceeds on the same view as to the effect of section 33 of the North-Western Provinces and Oudh Municipalities Act (XV of 1873). If the decision of this Court in *Municipal Commissioners for the City of Madras v. Sarangapani Moodaliar*(8) is to be understood as proceeding upon the supposition that the site and soil of streets in the City of Madras became vested in the municipality by Act IX of 1865 and that the

(1) L.R., 14 Ch. D. 785 at p. 797.

(3) L.R., [1895], A.C., 376

(5) 1 L.R., 13 Cal., 171

(7) I.L.R., 7 All., 362.

(2) L.R., 13 Q.B.D., 904.

(4) L.R., 15 Q.B.D., 572.

(6) 1 L.R., 20 Cal., 732.

(8) I.L.R., 19 Mad., 154.

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municipal corporation thereby became the proprietor of the land in trust for the public, such supposition is wholly irreconcilable with the decisions above referred to, both English and Indian, and with all deference to the learned Judges who took part in the decision, I am unable to concur in such opinion.

I am aware that in the definition of 'street' the word 'land' is used in connection with appurtenances to the street lying on either side of the roadway. It is evident that the word 'land' is used as denoting only what in reality is a portion of the street as such and that such portion of the street vests in the municipality only in the same way as the roadway or *via trita*.

In the view I take of the nature of the right vested in the municipality as regards public streets, there is no disposal by the Indian Legislature of any land or hereditament vested in Her Majesty by section 39 of the Government of India Act, 1858 (21 and 22 Vic., Ch. 106), assuming that the Crown is the owner of the land forming the street in question. It becomes therefore unnecessary to consider whether, having regard to the restriction imposed on the Indian Legislature by the proviso to section 22 of the Indian Councils Act, 1861 (24 and 25 Vic., Ch. 67), and to the authorities empowered in their executive capacity to dispose of all real and personal estate for the time vested in Her Majesty by section 40 of 21 and 22 Vic., Ch. 106, and section 1 of the Government of India Act, 1859 (22 and 23 Vic., Ch. 41), and to the restrictions imposed by the last-mentioned enactment on such power of disposal (which restrictions are to be prescribed from time to time, by the Secretary of State for India in Council), it would be competent for the Indian Legislature to transfer, to a local authority, real or personal estate which, "for being applied and disposed of for the purposes of the Government of India, is vested in the Crown."

The question of limitation has now to be considered, but as that cannot be decided until the question of ownership in the land, burdened with the highway and the drains, is determined (in regard to which certain issues will have to be remitted to the lower Appellate Court), I shall now deal with it only in view to drawing attention to the salient points on which the question of limitation turns. Under the English law, the maxim "once a highway, always a highway," is founded upon the notion that the public cannot release their rights and that there can be no

extinctive presumption or prescription [per Byles, J., in *Dawes v. S. Sundaram Hawkins*(1)]. Of course, a highway may both in England and here be extinguished or diverted under statutory provisions. The extinctive presumption and prescription referred to by Byles, J., are not the result of any statute of limitations, but of immemorial prescription from which a grant is to be presumed; but only in cases in which such grant could have a lawful origin. In the case of a highway, there could be no lawful grant even by the Crown, much less by any other authority or person, to obstruct the same or appropriate it or continue a nuisance thereon [*Attorney-General v. Parmeter*(2) and *Parmeter v. Gibbs*(3)]. The principles enunciated by Byles, J., are as applicable in India as in England, but, even if in England the right of highway is not extinguished by the operation of the law of limitation, it by no means follows that such extinction does not take place under the law of limitation in India. It would appear that in England up to the passing of the Public Health Act, 1875, there was no statutory provision which vested property in highways repairable by the inhabitants at large in any public body [per Lord Russell, C.J., in *Reynolds v. Urban District Council of Presteign*(4); *Octave Chavigny, &c. v. Lacite De Montreal*(5). See Bombay Act V of 1879 (Land Revenue Code), section 37]. Until the highways were thus vested in a corporation it seems tolerably clear that no question of limitation could have arisen in respect of highways under the English law of limitation. But it is not equally clear that since the vesting of highways in urban authorities, the English law of limitation could have no operation upon the property thus vested in them and I have not been able to find any case in the English reports in which the question was raised or considered. It is noteworthy that neither in *Wallasey Local Board v. Gracey*(6), nor in *Tottenham Urban District Council v. Williamson*(7) in which the Court of Appeal approved of and followed the former decision (in both of which it was held that under the provisions of the Public Health Act, 1875, the local authority cannot, in the absence

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(1) 8 C.B.N.S., 858 (S.C.), 29 L.J.C.P. at p. 347.

(2) 10 Price, 378. (3) 10 Price, 412 (S.C.), 24 R.R., 723.

(4) L.R., [1896], 1 Q.B., 604 at p. 608.

(5) L.R., 12 App. Cases, 149, at p. 159.

(6) L.R., 36 Ch.D., 593. (7) L.R., [1896], 2 Q.B., 353.

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of special damage, sue in respect of a public nuisance, except by an action in the nature of an information with the sanction of the Attorney-General) was it sought to sustain the suit on the ground that under section 149 of the Act, streets were vested in the local authority and that it was therefore competent for the local authority to maintain the suit in its own name. The Indian law of limitation has from the commencement been more comprehensive than the English statutes and the recent amendment of the Indian law of limitation by Act XI of 1900 (which provides a period of 30 years from the date of dispossession or discontinuance for a suit by or on behalf of any local authority for possession of any public street or road or any part thereof from which it has been dispossessed or of which it has discontinued the possession) seems to me to be now decisive on the question, whatever doubt may have possibly existed prior thereto; and I do not think that the new article (146-A) can be reasonably restricted to streets or roads formed by the municipality on lands belonging to or acquired by it in proprietary right. The operation of section 28 of the Limitation Act (XV of 1877) upon this new article will be to extinguish the right of highway on the expiration of 30 years from the date of dispossession of the municipality by encroachment and thus free the land from the burden of the highway, if the person encroaching upon the highway be the owner of the land. If the owner of the land on which the highway exists, be a third party, an encroachment of a permanent character on the public highway will also, as a general rule, operate as occupation of the soil and dispossession of the owner of the soil equally with the municipality, and his ownership will be extinguished in favour of the trespasser at the expiration of the ordinary period of limitation, viz, 12 years, and at the expiration of 30 years the ownership thus acquired by the wrongdoer will be freed from the burden of the highway. But if the highway has been dedicated to the public by the Crown, the right of the Crown as owner of the land can be extinguished only at the expiration of 60 years' adverse possession or occupation by the trespasser. The curious result, therefore, of the new article of the Limitation Act will be that, in cases in which the site of the street belongs to the Crown, on the expiration of 30 years from the date of dispossession of the municipality, the Crown will have the land freed from the burden of the highway and will be

entitled to remove the obstruction or encroachment and after removing the same, it may again dedicate, as a highway, the portion of land thus freed from the burden. But if it suffers the obstruction to continue for a further period of 30 years, the trespasser would become the absolute owner of the land. Section 23 of the Limitation Act which provides that in the case of a continuing wrong, a fresh period of limitation begins to run at every moment of the time during which the wrong continues, will cease to have operation from the moment when by virtue of section 28, the wrong ceases to be such by virtue of the title conferred by the statute on the wrong-doer. If, prior to the enactment of the new article (146-A), the ordinary period of 12 years under article 142 or 144, as the case may be, were applicable as against the municipality in respect of encroachments on public streets, the same result would have followed, except that the highway would have been extinguished at the expiration of 12 years instead of 30. I may also add that a person who causes an encroachment or obstruction of a permanent character on a highway or exceeds the right of ordinary and reasonable user of it for the purpose of passing and repassing, will, besides committing a public nuisance (at any rate in the case of an obstruction or encroachment), be also guilty of a trespass on the land for which the owner can sue him. [*Harrison v. Rutland*(1) and *Hickman v. Mausey*(2)].

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In connection with the requisition of the Municipal Council that the plaintiff should remove the pial over the drain in front of his house, it should be borne in mind that the owner of land adjoining a public highway, is legally entitled to erect gates or open doors so as to give him access to the highway at any point he pleases, whether the soil of the highway be his or not (*London and North-Western Railway Company v. Mayor, &c., of the City of Westminster*(3)).

For the determination of the second appeal it is necessary to remit the following issues for trial by the lower Appellate Court :—

(a) When and by whom was the street in question dedicated as a highway to the public and when was it first vested in

(1) L.R., [1893], 1 Q.B., 142.

(2) [1900], 1 Q.B., 752.

(3) W.N., 30th. November 1901, p. 230, 67 L.T., 83.

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any "local authority" as that expression is defined in section 3, clause 28 of the General Clauses Act (X of 1897), and when and by whom was the drain in question formed and when was it vested "in a local authority"?

(b) Irrespective of the operation, if any, of the law of limitation, who is entitled to the ownership of the land covered by the street and drain in front of the plaintiff's house, over which the structure claimed by the plaintiff projects?

(c) When was the plaintiff's house originally built and whether the structure in question was erected along with the building and if not when and how long afterwards?

(d) What are the nature and dimensions of the structure in question and of the drain underneath it, the extent of the road covered by it and the number and dimensions of the pillars on the road supporting it?

As some of the issues now to be sent for trial involve the question of the right of the Government to the ownership of the soil in public streets, and as all material documents bearing on this question will be in the possession of Government, I think it desirable that the Secretary of State for India in Council should be joined as a party to the suit and appeal in this and the connected Second Appeals Nos 792 and 1101 under sections 32 and 582, Civil Procedure Code. But at this stage of the case I am not disposed to do so without the consent of Government. The appellant and respondent state that they have no objection to the Government being joined as a party.

Parties will be at liberty to adduce fresh evidence at the trial of these issues and to exhibit the requisite plans after duly proving the same. The Subordinate Judge will submit his findings on the above issues within three months after the receipt of this judgment.

BENSON, J.—I entirely concur with my learned colleague as to what is meant by the Legislature vesting streets in a Municipal Council. The whole current of authority both in England and in India shows that such vesting does not transfer to the municipal authority the rights of the owner in the site or soil over which the street exists. It does not own the soil from the centre of the earth *usque ad coelum* but it has the exclusive right to manage and control the surface of the soil and so much of the soil below and of the space above the surface as is necessary to enable it to

adequately maintain the street as a street (*Coverdale v. Charlton*(1)), and it has also a certain property in the soil of the street which would enable it as owner to bring a possessory action against trespassers (*Rolls v. Vestry of St. George*(2)), "so that the complete vindication of the rights of the public should be preserved by the local authority" (*Mayor of Tunbridge Wells v. Baird*(3)). This property is, as my learned colleague put it, not general property or a species of property known to the Common Law but a special property, the creature of the statute, and vested in the local authority for a public purpose.

I am also prepared to concur as to the results that will flow from the application of the law of limitation, if the plaintiff has established a prescriptive right to a portion of the public street, but having regard to the limited and special nature of the right over the soil vested in the Municipal Commissioners, it is difficult to see how the erection of the pial described in the plaint could amount to a dispossession of the Municipal Commissioners in respect to this right so as to enable the plaintiff to acquire the rights of a full owner over the site occupied by the pial. The Subordinate Judge has found as a fact that the plaintiff's possession was "always under leave of the municipality, who had control of the drain underneath" Apparently there was nothing else which the municipality had any occasion to do in the exercise of its duty to maintain the street (including the drain) on behalf of the public. It lies on the plaintiff who seeks for an injunction to establish his title and the only title alleged is by prescription. It is difficult to see how the erection of this pial which apparently did not interfere with the maintenance of the street as a street could be held to be a dispossession of the commissioners with regard to the street. The information on the record, however, as to the nature and extent of the pial is not very full or accurate. Before finally deciding the question I agree that it is desirable to have further evidence on these points. I therefore concur in the order proposed by my learned colleague. I reserve for consideration after we have a finding on the issues referred, the question whether the remedy by injunction is one that ought, in any event, to be granted in a case like the present where

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(1) L.R., 4 Q.B.D., 104.

(2) L.R., 14 C.D., per James, L.J., at p. 795.

(3) L.R., [1896], A.C., 434, per Lord Halsbury.

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the removal of the pial is alleged to be necessary on sanitary grounds.

[Plaintiff ultimately withdrew the appeal, which was, in consequence, dismissed for default of prosecution.]

APPELLATE CIVIL.

Before Mr. Justice Bhaskyam Ayyangar and Mr. Justice Moore.

1901
December 16

VIDIHYAPURANA THIRTHASWAMI, MINOR
BY HIS NEXT FRIEND VYASACHARY (PETITIONER), APPELLANT,

v

VIDYANIDHI THIRTHASWAMI, A LUNATIC
REPRESENTED BY HIS GUARDIAN *ad litem* KESHAVACHARYA
AND FIVE OTHERS (COUNTEER-PETITIONERS),
RESPONDENTS.*

Letters Patent, art 15—"Judgment"—Order dismissing petition praying Court to receive security for costs—Appeal.

An order dismissing a petition praying the Court to receive a sum of money as security for the costs of an appeal is a judgment within the meaning of article 15 of the Letters Patent and an appeal lies therefrom.

PETITION praying the Court, in the circumstances stated in the affidavits filed therewith, to receive from the petitioner, as appellant in Appeal No. 227 of 1900 on the file of the High Court Rs. 1,664 as security for the costs of the respondents in that appeal. The affidavit of the guardian of the petitioner alleged that he had had no definite knowledge of the details of the order directing security to be given until after the date on which the security should have been lodged. The application was heard by Mr. Justice Benson who dismissed it. Petitioner filed this appeal under article 15 of the Letters Patent.

The Advocate-General (Hon. Mr. J. E. P. Wallis), C. Santharan Nayar and K. Narayana Rao for appellant

C. Ramachandra Rau Sahib for respondents.

JUDGMENT.—A preliminary objection has been raised as to whether an appeal lies under the Letters Patent against the order of

* Appeal preferred under article 15 of the Letters Patent against an order passed by a Judge of the High Court, Madras, in C M P. No. 627 of 1901.

Benson, J. As the effect of that order, refusing to receive the sum ordered to be paid as security, would be to finally deprive the appellant of his power of prosecuting his appeal, we consider that the order of Mr. Justice Benson amounts to a judgment within the meaning of article 15 of the Letters Patent and that there is consequently an appeal against it. As the order of Mr. Justice Boddam ordering security to be furnished was indefinite in that it did not fix an exact date on or before which security was to be given, we consider that the sum tendered to this Court as security should have been received. We accordingly direct that the same be received provided it be tendered in cash to the Registrar of this Court on or before the 20th instant and the time for furnishing security is extended to that day. The Advocate-General on behalf of the appellant states that he does not wish to prosecute Appeal No. 227 of 1900 against the legal representatives of the first respondent (deceased).

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The parties will bear their own costs of this appeal

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

NARAYANA CHETTIAR (PILAIYAR), APPELLANT,

v.

1901
December 17.

CHOKKAPPA MUDALIAR AND SEVEN OTHERS
(DEFENDANTS), RESPONDENTS *

Revenue Recovery Act—Act II of 1861, s. 38, 39—Sale of land for arrears of revenue—Proclamation of purchaser's name—Subsequent contention that purchase was benami—Validity

Where land has been sold for arrears of revenue under the Revenue Recovery Act of 1864, and the name of the purchaser has been published in pursuance of section 39 of that Act, the effect of such proclamation is to vest the property absolutely in the purchaser as there named, and it will not be open to any one to contend subsequently that the purchaser was a benamidar and that the real purchaser was some one else.

* Second Appeal No 1165 of 1899 against the decree of G. F. T. Power, District Judge of Tanjore, in Appeal Suit No. 533 of 1898 presented against the decree of V. Kuppuswami Aiyar, District Munsif of Tirutturaippundi, in Original Suit No. 19 of 1898.

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Tirumalayappa Pillai v. Sivan Nasckar, (I L R., 18 Mad., 469), and *Subbayar v. Asirvatha Upadesaayyar*, (I L R., 20 Mad., 494), explained

SUIT for the recovery of land. The land in question had formerly been the property of one Dandayuda Chettiar, and was sold, under the Rent Recovery Act, 1864, for arrears of revenue. It was purchased by Dandayuda Chettiar's grandson Palaniappa Chettiar, from whom plaintiff derived his alleged title by purchase. Defendants Nos. 3 and 4 were in possession, and claimed as purchasers from members of Dandayuda Chettiar's family. Their case was that, though Palaniappa Chettiar was the nominal purchaser at the revenue sale, the purchase had been really effected by Dandayuda Chettiar with his own money, in Palaniappa Chettiar's name, and that in consequence Palaniappa Chettiar was not the owner of the land and his conveyance of it to plaintiff was fraudulent and invalid. Defendants Nos. 1 and 2 were dismissed from the suit by the District Munsif, who, however, gave plaintiff a decree for possession as against the other defendants. He found that Palaniappa Chettiar had purchased the land for himself and was not a mere benamidar for Dandayuda Chettiar, and that consideration had passed for the conveyance to plaintiff. On appeal, the District Judge disagreed with this finding. He considered the evidence on the point, and upheld the contention of the defendants that Palaniappa Chettiar was a mere benamidar and was not really the owner of what he professed to sell to plaintiff. He held that plaintiff had no title, and dismissed the suit.

Plaintiff preferred this appeal.

P. R. Sundara Ayyar for appellant.

V. Krishnasami Ayyar and *K. Ramachandra Ayyar* for fourth respondent (fourth defendant).

JUDGMENT.—We cannot say that there was not evidence on which it was open to the District Judge to say that the transaction was benami. The sale in the present case, however, was one under Act II of 1864 (Madras) and the question therefore as to whether it is open to the third and fourth defendants to contend that the real purchaser was Dandayuda Chettiar and that Palaniappa Chettiar was merely a name lender must be considered with reference to section 38 and more especially to section 39 of that Act. The former section provides that the certificate granted by the Collector shall state the name of the purchaser and shall be conclusive evidence

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of the fact of the purchase, and section 39 goes further and directs that the Collector shall publish the name of the purchaser with a declaration of the lawful succession of such purchaser to all the rights and property of the former landholder. We must hold that the effect of this proclamation is to vest the property absolutely in the purchaser as there named and that it is not open to any one to contend subsequently that such purchaser was a benamidar and that the real purchaser was some one else. We have been referred to two decisions of this Court which, it is urged, are opposed to the view which we have now expressed as to the interpretation to be placed on section 39, *i.e.*, those to be found in *Turumalayappa Pillai v. Swami Naickar* (1) and *Subbarayan v. Asivatha Upadesayyar* (2). On referring, however, to those decisions it will be found that they are not really in conflict with the conclusion which we have now arrived at. In *Turumalayappa Pillai v. Swami Naickar* (1), the real question at issue was as to the right of the benamidar to sue and in the reference which Mr. Justice Muttusami Aiyar does make to Act II of 1864 it will be found that he refers to section 38 only and has not considered section 39. Although the head-note in *Subbarayan v. Asivatha Upadesayyar* (2) calls the purchase there under consideration a benami transaction it will be found that such was not the case. The allegation there put forward was that the plaintiff's father had made the purchase not solely on his own behalf, but on behalf of all the villagers, of whom he was one. Such a purchase is not benami. No question as to whether the transaction now under consideration involved an obligation in the nature of a trust under section 62 of the Trusts Act having been raised in either of the lower Courts we cannot allow such a question, which would necessitate the trial of issues under that section and section 96, to be mooted now. For these reasons we must hold that it was not open to the third and fourth defendants to contend that Palaniappa Chettiar was not the real purchaser and we accordingly set aside the decree of the District Judge and restore that of the District Munsif with costs here and in the lower Appellate Court.

(1) I L R., 18 Mad., 469

(2) I L R., 20 Mad., 494.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

1901.
December 18

AMEER AMMAL (REPRESENTATIVE OF JUDGMENT-DEBTOR),

APPELLANT,

v.

SANKARANARAYANAN CHETTY (DEED-HOLDER),

RESPONDENT.*

Muhammadian Law—Dower—Suit on a mortgage executed by judgment-debtor—Decree for sale—Discharge of judgment debts in lieu of dower—Attempt by purchaser to obtain possession—Resistance by defendant—Held that the dower formed a charge on the land

A widow's claim for dower under Muhammadan Law is not a lien on her husband's property, such as is obtained by a mortgage but ranks on a par with ordinary debts.

PETITION under section 334 of the Code of Civil Procedure complaining of an obstruction preventing the petitioner from obtaining possession of property. Petitioner had purchased the property at a Court auction sale, and attempted to take possession of it, when he was obstructed by the second counter-petitioner, Ameer Ammal, widow of the first judgment-debtor in the suit in execution of which the auction sale had been held. The decree was one for sale and the suit was based on a mortgage executed by the first judgment-debtor therein. The second counter-petitioner had been brought on the record in execution as the representative of that defendant. The ground of her resistance was that the property in question was liable for her dower, and that as it had not been sold subject thereto the sale was invalid. It was admitted that no charge for dower had been created by agreement. The District Munsif held that the sale was binding on second counter-petitioner, and that her claim for dower could not prevail against petitioner.

The District Judge, on appeal, said:—"Appellant, in her counter-petition, did not allege that she was in possession in lieu of dower. She did not even allege that she was in possession. If she has a

* Appeal against the order of H. Moberly, District Judge of Madura, in Appeal Suit No 399 of 1900, against the order of A. Narayanan Nambiar, District Munsif of Madura, in Miscellaneous Petition No 733 of 1900 in Execution Petition No 733 of 1899 in Original Suit No 117 of 1895

claim for unpaid dower, that claim constitutes a debt payable *pari passu* with the demands of other creditors, but does not become a preferential charge on the estate in the absence of Bye-Mokhasa (Sutherland's 'Privy Council Judgments,' Volume II. page 599)." He dismissed the appeal.

Against that order, second counter-petitioner preferred this appeal.

S. Subramania Ayyar for appellant.

V Krishnaswami Ayyar for respondent.

JUDGMENT.—The decision of the District Judge is, in our opinion, right. A widow's claim for dower under Muhammadan Law is not a lien on her husband's property such as is obtained by a mortgage. The Muhammadan Law has nowhere placed a claim for dower as high as a mortgage, but has ranked it on a par with ordinary debts (*Mussamut Wahidunnissa v Mussamut Shubriathen*(1)) In the present case the widow has no doubt been in possession since the death of her husband, but such possession can give her no right as against a purchaser in execution of a decree for sale passed on a mortgage executed by her husband. This appeal is dismissed with costs.

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v
SANKARA-
NARAYANAN
CHITTAI

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, and Mr Justice Benson.

SANGILIA PILLAI, PETITIONER,

v.

1901
December 18

THE DISTRICT MAGISTRATE OF TRICHINOPOLY, COUNTER-
PETITIONER.*

Criminal Procedure Code—Act V of 1898, s 476—"Judicial Proceeding"—

Records of case called for by District Magistrate in his executive capacity

Though an order passed after records have been called for, for any of the purposes specified in section 435 of the Code of Criminal Procedure, may be a

(1) 6 Beng L R, 54

* Criminal Revision Petitions Nos. 279 and 280 of 1901, under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of R H Shipley, District Magistrate of Trichinopoly, dated 28th August 1901, and the order of H G Joseph, Sessions Judge of Trichinopoly, dated 28th September 1901, passed on Criminal Miscellaneous Petition No. 18 of 1901.

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"judicial proceeding" for the purposes of section 476 (as to which the Court gave no ruling), where a District Magistrate called for such records in his executive capacity to see whether an application for an enquiry into the conduct of a police constable should be granted, and passed an order thereon, sanctioning his prosecution

Held, that there was no judicial proceeding within the meaning of section 476, and that the order must be set aside

PETITION to revise an order sanctioning the prosecution of petitioner (a head constable) on a charge of giving false evidence under section 193, Indian Penal Code. The order was passed by the District Magistrate of Trichinopoly on 28th August 1901, in a proceeding in which it was recited that the following documents had been read:— A petition; records of an enquiry held by the District Superintendent of Police; and a reference to the Public Prosecutor and his reply. The order was in the following terms:— "ORDER—From the records [in certain calendar cases on the file of the Town Sub-Magistrate in which four persons charged with having committed burglaries were discharged] and from the Public Prosecutor's letter [expressing his opinion, in reply to a reference to him on the point that proceedings against petitioner under section 193, Indian Penal Code, would stand] it appears that there is sufficient evidence to institute proceedings against Sangili (head constable) for an offence under section 193, Indian Penal Code. In these circumstances the District Magistrate sanctions the prosecution of Sangili before the Head-quarters Deputy Magistrate." Petitioner applied for revocation of the sanction to the Session Judge, who held that if the order in question was to be taken as one passed under section 195, the Sessions Court would be bound to cancel it, inasmuch as the District Magistrate had no authority to grant any sanction in the matter, since he was not the 'ordinary appellate authority,' and as the provision in the order as to the Court before which the charge was to be tried was beyond the scope of such a sanction. But he thought, from the form of the order and the material on which it had been passed, that the District Magistrate had passed it under section 476 of the Code of Criminal Procedure, the proceeding having been passed by the Magistrate *suo motu* after an enquiry held by him through others. He agreed that the grant of sanction under section 476 would be illegal, as the offence charged had not been committed before the District Magistrate or brought to his notice in the course of judicial proceedings; but held that the Sessions

Court was not competent to consider that question. He dismissed the petition on the ground that no appeal lay to the Sessions Court.

Petitioner filed petitions in the High Court against the order of the District Magistrate of 28th August 1901 and that of the Sessions Judge.

T. Rangachari for petitioner

The *Public Prosecutor* for the Crown

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NOPOLY.

JUDGMENT.—The Public Prosecutor has conceded that the order of the District Magistrate, dated 28th August 1901, cannot be upheld as an order for sanction to prosecute such as is required by section 195 (1) (b) of the Code of Criminal Procedure inasmuch as the District Magistrate is not the Court to which the Sub-Magistrate is subordinate within the meaning of section 195 (7), Criminal Procedure Code. He has contended, however, that the order is valid as an order made under the powers conferred by section 476. Assuming the order was intended to be made under section 476, its validity depends on whether the alleged offence was brought to the notice of the District Magistrate in the course of a judicial proceeding. The Public Prosecutor has argued that the District Magistrate must be assumed to have called for the records under the powers conferred by section 435, and that an order made on consideration of the records called for under that section is a judicial proceeding for the purposes of section 476. It is not necessary for us to consider the general question whether an order made after the records have been called for is a judicial proceeding for the purpose of section 476. It may be that an order made after the records have been called for for any of the purposes specified in section 435 would be a judicial proceeding for the purposes of section 476. In the present case, however, it seems to us clear from the terms of the petition on which the order of 28th August 1901 was made and from the endorsement of the Sub-Magistrate submitting the records that the order of that date was not made after the records had been called for for any of the purposes mentioned in section 435. The order calling for the records seems to have been made by the District Magistrate in his executive capacity for the purpose of enabling him to ascertain whether the petitioner's prayer for an enquiry into the conduct of the Police should be granted. In our judgment the present case does not come within the terms of section 435 and we think there was no judicial proceeding for the purposes of section 476.

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NOLLY.

The Public Prosecutor has further contended that it was competent for the Deputy Magistrate to take cognizance of the offence under section 190 and that the order of 28th August 1901, which purports to grant sanction, was unnecessary and may therefore be treated as a nullity. We feel no doubt that the offence alleged to have been committed is an offence in relation to a proceeding in a Court within the meaning of section 195 (b) of the Code of Criminal Procedure. Sanction is therefore necessary.

The order of the District Magistrate, dated 28th August 1901, must be set aside.

APPELLATE CIVIL.

*Before Sir Arnold White, Chief Justice, and Mr. Justice Moore.**

1901.
December
11, 12.
1902.
January 3.

CHEMNAUTHA ATTEKUNNATH LAKSHMI AMMA
AND TWO OTHERS (DEFENDANTS NO. 2 TO 4), APPELLANTS,

v.

PALAKUZHU THUPPAN NAMBUDRI AND ANOTHER
(PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

Malabar law—Sarasvadanom marriage—Devolution of property of wife's illom on her decease without issue—Nambudries—Self-acquisitions.

First defendant, who was the nephew of S, had executed a hypothecation bond over certain property in plaintiff's favour, subject to a prior mortgage which had been executed by his uncle in favour of P. The assignee of a decree against S then caused the properties to be attached and proclaimed for sale, when plaintiff preferred a claim, which was allowed. At a sale which took place subsequently, N purchased the property subject to P's and plaintiff's debts. N then assigned his right to defendants Nos. 2 to 8, who paid P the amount of his debt, but did not pay plaintiff. Plaintiff now sued all the defendants for the amount due under his bond, and claimed that the mortgaged property should be sold in default of payment. Defendants contended that the property was not the jenmam of first defendant's illom, their case being that first defendant's senior paternal uncle, S, had obtained it as a gift from his wife's illom, and that, in consequence, his nephew, first defendant, had no right to execute a mortgage over it:

* Second Appeal No. 495 of 1900 against the decree of A. Venkataramana Pai, Subordinate Judge of South Malabar at Palghat, in Appeal Suit No. 617 of 1899, reversing the decision of P. F. Raman Menon, District Munsif of Angadipuram, in Original Suit No. 224 of 1898.

Held, that in the face of this admission it was impossible for defendants to contend that, on the death of S's Sarasvadanom wife, S lost all his rights over the property of her illom.

Whether, under the customary law governing the Nambudries of Malabar, self-acquisitions pass, at death, to the immediate heirs of the acquirer rather than to his illom.—*Quære*.

Whether, in the case of a Sarasvadanom marriage, the wife dying without issue, the property of her illom vests in her husband by virtue of his affiliation under that marriage.—*Quære*

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*
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SUIT for sale of mortgaged property. The amount claimed was the principal and interest due under a registered hypothecation bond executed by first defendant on 8th April 1886. The plaintiff alleged that items Nos. 1 to 15 were the jenmam of first defendant's illom, that items Nos. 16 to 24 were demised on kanom to first defendant's illom, that first defendant's uncle Sankaran Nambudri mortgaged all the 24 items to Pakeeri Rowthan for Rs. 3,000, that first defendant had executed the hypothecation bond now sued on to plaintiff subject to Pakeeri Rowthan's mortgage, and authorised plaintiff to collect the porapad due by Pakeeri Rowthan, that the interest due to plaintiff for the year 1886-87 had been paid by Pakeeri Rowthan, that while the lands were so held the assignee of a decree against Sankaran Nambudri caused the properties to be attached and proclaimed for sale, that plaintiff thereupon preferred a claim, which was allowed, that in the sale which afterwards took place Narayanan Nair purchased the lands subject to plaintiff's and Pakeeri Rowthan's debts, that, in 1888, Narayanan Nair assigned his right to defendants Nos. 2 to 8, who paid off Pakeeri Rowthan's debt and reduced the properties to possession. Plaintiff claimed to be entitled to recover the panayom and interest thereon from March 1887.

First defendant admitted plaintiff's mortgage but contended that inasmuch as the lands had been sold and purchased subject to plaintiff's debt, defendants Nos. 2 to 8, who were in possession, were alone liable for the debt. The chief point of defence of the other defendants was that they were not personally liable for any part of the claim, that items Nos. 1 to 15 were not the jenmam of first defendant's illom, that Sankaran Nambudri had "got those items by gift", that first defendant, who was the son of Sankaran Nambudri's divided brother, had no right to execute the mortgage and that they only held possession of items Nos. 1 to 15.

The District Munsif dismissed the suit. On appeal, the Subordinate Judge said :—"The first question is whether the first

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defendant had authority to execute the plaint mortgage deed. It is undisputed that the mortgaged property belonged to Sankaran Nambudri under a Sarasvadanom grant. His Sarasvadanom wife having died issueless the property belonged to Sankaran Nambudri exclusively, and on his death it lapsed to his *mana*." He found that first defendant had authority to execute the mortgage, and that it had been executed for consideration. He reversed the decision of the District Munsif and gave plaintiff a decree as prayed.

Defendants Nos 2 to 4 preferred this second appeal.

P. R. Sundara Ayyar for appellants.

V. Ryrü Nambiar for first respondent.

JUDGMENT.—In paragraph 3 of his judgment the Subordinate Judge observes that the mortgaged property which forms the subject matter of this second appeal belonged to Sankaran Nambudri under a Sarasvadanom grant and then adds "His Sarasvadanom wife having died issueless the property belonged to Sankaran Nambudri exclusively, and on his death it lapsed to his *mana*." The correctness of the findings of the Subordinate Judge on the two points of law dealt with in this paragraph has been strongly contested here in second appeal.

If the Subordinate Judge intended to lay down as a rule of law that, notwithstanding the death of the wife without issue, the property of her illom vested absolutely in her husband by virtue of his affiliation under his Sarasvadanom marriage, it is very doubtful if his decision could be upheld. In *Kishava Thavagan v. Rudran Nambudri*(1) the question as to whether the interest of the son-in-law divested by failure of issue of a Sarasvadanom marriage was considered, but not decided and in two more recent decisions (*Kumaran v. Narayanan* and *Vasudevan v. The Secretary of State for India*(2)), in which the nature of a Sarasvadanom marriage was very fully considered, it was not necessary to decide the question now under consideration. In the latest judgment of importance delivered by the High Court relating to marriages of this description (*Amayur v. Kotimadhathil Itticheri and the Secretary of State for India*(3)) the decision of the majority of the Judges (Muthuswami Aiyar and Parker, JJ., Shephard, J, dissenting) is clearly in

(1) I.L.R., 5 Mad., 259

(2) I.L.R., 9 Mad., 260; I.L.R., 11 Mad., 157.

(3) Second Appeal No. 800 of 1887 (unreported).

favour of the contention now advanced on behalf of the appellants. That judgment has, however, not been reported. Under these circumstances it cannot be held that the question now under consideration is concluded by authority. It is, however, not necessary to decide it in the present second appeal inasmuch as the second, third and fourth defendants (appellants) have, in their written statement, clearly admitted that Sankaran Nambudri obtained the properties as a gift from his wife's illom. What is there stated is as follows:—(paragraph 6) · Items Nos 1 to 15 were the jenmam and the remaining items the kanom of the Thiruthiyil illom. Those and other properties together with the rights aforesaid were obtained by Sankaran Nambudri, the senior paternal uncle of the first defendant, as a gift.” In the face of this admission it is impossible for the appellants to contend that, on the death of his Sarasvadanom wife, Sankaran Nambudri lost all his rights over the property of her illom. It may be mentioned that this gift has already come under the consideration of the High Court in *Kishava Thavagan v. Rudran Nambudri*(1)

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It is further urged on behalf of the appellants that the Sub-ordinate Judge has wrongly held that on the death of Sankaran Nambudri the property that he had acquired in consequence of his Sarasvadanom marriage lapsed to his *mana* or *illom*. It is urged that under the ordinary Hindu Law such property would be inherited by Sankaran's own immediate heirs and that it has never been held by the High Court that in this respect the law governing the Nambudries of Malabar differs from the ordinary Hindu Law prevailing on the East Coast. There is much force in this contention. It does not appear to us that this question has ever been clearly and definitely decided by the High Court with reference to Nambudries. The decisions of the local Courts show that for many years there was no uniform custom as to the devolution of the self-acquired property of a member of either a Malabar tarwad or illom. As to this Mr. Justice T. I. Strange, who was employed for many years in Malabar, observes as follows in his 'Manual of Hindu Law' (second edition, section 399): "Self-acquired moveable property, namely, that which is obtained by individual exertion and without aid from the family funds, belongs exclusively to the acquirer, and may be disposed of by him at

(1) I.L.R., 5 Mad, 259.

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his pleasure Females may hold it as well as males On demise, it descends, in the case of males, to their sister's sons, or nearest Anandravans, and, in the case of females, to their issue male and female" Mr. (afterwards Mr. Justice) Holloway, whose influence, as District Judge of Tellicherry and subsequently as Judge of the High Court, on the development of Malabar Law as set forth in legal decisions can scarcely be overestimated, did not accept this view As Judge of Tellicherry he, in *Mayil Manikothu Kamaran v. Manikotha Cheriya Ryyu*(1) observed as follows—"The truth of the matter is that Kannan (the deceased kannavan) acquired the property and, following the fallacy which is very prevalent, it has been supposed that his immediate juniors are those entitled to inherit it. It is unnecessary to say that this is not the law of Malabar, a law which I deplore as fruitful in mischief, but by which I am bound" On appeal, this decision was confirmed by the High Court (*Athalur Vayatha Shangara Varier v. Manisherry*)(2), but the Judges in dismissing the appeal wrote no judgment and recorded no reasons for their decision In so far, however, as Nayars are concerned the law was clearly laid down in the case of *Kallati Kunju Menon v. Palat Errachu Menon*(3) (per Scotland, C.J., and Holloway, J.) as follows:—"It is unquestionably the law of Malabar that all acquisitions of any member of a family undisposed of at his death form part of the family property, that they do not go to the nephews of the acquirer, but fall, as all other property does, to the management of the eldest surviving male." This decision, which has been uniformly followed by the Courts, settled the law in so far as Nayar tarwads are concerned. With respect to Nambudries there is, however, no definite ruling of the High Court. In *Vasudevan v. The Secretary of State for India*(4) the learned Judges, no doubt in discussing certain questions regarding the personal law of Nambudries observed that among them "self-acquired property merges on the death of the person acquiring it with family property as is the case among Nayars." This observation, however, cannot be looked on as anything more than a mere *obiter dictum* as no question as to the self-acquisitions of Nambudries was then before the Court. The course of the decisions being

(1) Appeal Suit No 19 of 1862

(3) 2 M.H.C.R., 162.

(2) S A 98 of 1862 (unreported).

(4) 1 L.R., 11 Mad., 157.

as now set forth, we should certainly not be prepared to hold that it is not open to the appellants to contend that the self-acquisitions of Sankaran Nambudri passed on his death to his own immediate heirs and not to his illom if this contention had been raised either before the Court of First Instance or the lower Appellate Court. From the records however it is clear that this plea was never even suggested till this case came before us on second appeal. Such being the case we must refuse to refer this point, as we have been requested to do, to the lower Courts for enquiry and decision.

As regards interest we accept the view of the Subordinate Judge as set forth in paragraph 9 of his judgment.

The second appeal is dismissed with costs.

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APPELLATE CRIMINAL.

Before Mr. Justice Subrahmanu Ayyar and Mr. Justice Binson.

KING-EMPEROR

v

IHAMMANA REDDI AND TWO OTHERS, ACCUSED.

1901
January 16

Criminal Procedure Code—Act 1 of 1898, s. 250—frivolous or vexatious accusations—Case instituted on "information given to a Magistrate"—Information to a Village Magistrate—Discharge of accused—Order awarding compensation—Validity.

A Village Magistrate is not a Magistrate within the meaning of section 250 of the Code of Criminal Procedure, and where a case has been instituted in consequence of a complaint made to a Village Magistrate who sent a report to the police, who submitted a charge sheet, the person who complained to the Village Magistrate cannot be ordered, under section 250, to pay compensation to the accused if the latter are discharged.

CASE referred for orders of the High Court. The facts appear from the letter of reference, which was as follows:—

"Section 250 of the Code of Criminal Procedure directs the award of compensation for frivolous or vexatious accusations in any case instituted by complaint as defined in the Criminal

* Case referred for the orders of the High Court under section 438 of the Criminal Procedure Code by C. R. Mounsey, District Magistrate of Coimbatore, in his letter, dated 13th November 1900, Reference on Criminal Revision No. 52 of 1900.

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Procedure Code or upon 'information given to a Police officer or to a Magistrate.' In Criminal Case No. 117 of 1900 on the file of the Taluk Second-class Magistrate of Bhavani, a case of house-breaking and theft in a building (sections 454 and 380, Indian Penal Code) the accused were discharged under section 233, Criminal Procedure Code, and the prosecution witness No. 2 was ordered by the Taluk Magistrate (second class) to pay compensation of Rs. 40 to each of the accused. The complaint in this case was originally made to the Village Magistrate, who sent a report to the police. The police investigated the case and submitted a charge sheet to the Taluk Magistrate. The Taluk Magistrate was of opinion that the case was instituted upon information given to a Magistrate—the Magistrate in this case is a Village Magistrate or in other words head of a village. Under section 1 of the Criminal Procedure Code nothing contained in that Code in the absence of any specific provision to the contrary shall apply to heads of villages in the Presidency of Fort St. George. I am of opinion that the information in this case was not given to a Magistrate, as the word Magistrate is used in section 250, Criminal Procedure Code, and that the award of compensation is not authorized by the Code. The case seems really to have taken up owing to a Police officer making a report. The judgment of the Taluk Second-class Magistrate contained the following paragraphs 21 and 22:—'I discharge the accused under section 233, Criminal Procedure Code. I called on prosecution witness No. 2 who informed the Village Magistrate about the alleged house-breaking and theft and on whose information all proceedings have been taken to show cause why he should not be ordered to pay compensation to the accused. He repeats that his complaint is true. I have written in great detail the reasons for disbelieving the complaint. The accused were arrested by the police on 9th October 1899, and produced before this Court and were let out on bail on 11th October 1899. They have been thus subjected to considerable humiliation. I have considered over the matter of awarding compensation and believe such patently vexatious charges should be put down. Taking all the circumstances into consideration, I direct that prosecution witness No. 2 do pay to each of the accused Rs. 40 under section 250, Criminal Procedure Code.'

Mr. *W. Barton*, for the Public Prosecutor, for the Crown.

Mr. *C. Krishnan* for the accused.

JUDGMENT.—We think that the view of the District Magistrate is correct. We set aside so much of the Second-class Magistrate's order as was made under section 250, Criminal Procedure Code, and direct that the amount, if any, levied as compensation be refunded.

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EMPEROR
v.
TAAMMANA
REDDI.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

CHALADOM THOLAN AND ANOTHER (DEFENDANTS), PETITIONERS,
v. 1902.
February 3.

KAKKATHI KUNHAMBURU (PLAINTIFF), COUNTER-PETITIONER *

Civil Procedure Code—Act XIV of 1882, s. 43—Former suit for injunction to restrain defendants from removing shells stored on certain land—Dismissal as not maintainable—Subsequent conversion by defendants of the shells—Suit for their value—Maintainability—Agricultural tenants—Right to dig shells.

Though a tenant of lands for the cultivation of paddy may possibly, be justified in digging up shells from the land for the cultivation of the land in a proper and husband-like manner, the property in the shells so dug up is (in the absence of local custom) not in the tenant but in the landlord, and the tenant has no right to convert them to his use.

Defendants, who held land for the cultivation of paddy, had dug up from the land shells which are used for the manufacture of lime, and stored them on the land. The landlords had let the right to dig these shells to plaintiff, who, in conjunction with the landlords, and while the shells were still on the land, sued for a perpetual injunction restraining defendants from digging shells and also to restrain them from carrying away those which they had already dug, and which were stored on the land. That case was dismissed as not being one in which an injunction could be granted. Subsequently to its dismissal, defendants removed the shells, and converted them to their own use. Plaintiff now sued for their value; when it was pleaded that the suit was barred by section 43 of the Code of Civil Procedure.

Held, that the suit was not barred.

SUIT to recover the value of shells (used for the manufacture of lime), which had been removed by defendants (petitioners) from certain land. This land was held by defendants as agricultural tenants for the cultivation of paddy. Plaintiff (respondent) was

* Civil Revision Petition No. 230 of 1900 under section 25 of Act IX of 1887 praying the High Court to revise the decree of M. Mundappa Bangera, District Munsif of Tellicherry, in Small Cause Suit No. 250 of 1900.

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v.
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KUNHAMBU.

a subsequent lessee, under the landlords, of the right to dig up and take shells from the land, subject to the duty of not causing any detriment to the use of the land for agricultural purposes by the cultivating tenants. Defendants had dug up a large quantity of shells, which they stored for some time on the land. Whilst the shells were on the land, plaintiff and the landlords brought Original Suit No. 469 of 1899 against defendants, in which a perpetual injunction was claimed restraining them from digging up shells from the land, and also to prevent them from carrying away the shells which had been already dug up and which were at that time stored on the land. The District Munsif dismissed that suit on the ground that the case was not one for an injunction, as adequate pecuniary compensation could be obtained by the then plaintiffs for the invasion of their rights. He left undecided the question, raised in one of the issues, whether defendants had any right in the shells. After that decision, defendants removed the shells which, at its date, were stored on the land. The lessee of the right to dig shells now sued to recover the value of the shells so removed. The defence was twofold: (1) that plaintiff had no right to the shells, which, it was contended, belonged to the defendants, the agricultural tenants; (2) that the suit was barred by section 43 of the Civil Procedure Code. The District Munsif held that inasmuch as defendants were simple tenants the right to the shells found underground belonged to the landlords, under whom plaintiff was entitled to recover as lessee of the landlords' rights. On the second point he held that the suit was not barred by section 43 of the Code of Civil Procedure, as Original Suit No. 469 of 1899 had been dismissed on the ground that it was not maintainable in law. He gave plaintiff a decree for the value of the shells which defendants had removed. Defendants filed this revision petition.

V. Ryru Nambiar for petitioners.

J. L. Rosario for counter-petitioner.

JUDGMENT.—The petitioners are agricultural tenants of some lands for paddy cultivation and the respondent is a subsequent lessee under the landlord of the right to dig up and take shells from the holding without causing any detriment to the use of the land for agricultural purposes by the tenants. It is found that the agricultural tenants dug up a large quantity of shells and converted them to their own use. But they have not alleged or proved

any local custom entitling them to do so (*Tucker v. Linger*(1)). Whether the tenant was or was not justified in digging up shells for cultivating the land properly and in a husband-like manner, the property in the shells is not in him, but in the landlord, or rather the plaintiff, the respondent, the assignee of the landlord (*Tucker v. Linger*(1); *Elwes v. Briggs Gas Coy.*(2)). In the absence of a local custom the defendants had not a right to convert the shells, which they dug up, to their own use. Section 43, Civil Procedure Code, is in our opinion no bar to any portion of the claim made in this suit, for it is admitted that even such portion was on the holding where it was stored up at the date of the former suit for injunction, but was removed and converted by the defendants to their own use only subsequent to the former suit.

The revision petition therefore fails and is dismissed with costs.

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v.
KAKKATH
KUNHAMBU.

APPELLATE CRIMINAL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

JOHN MARTIN SEQUEIRA (COUNTER-PETITIONER), PETITIONER,

v.

1901.
February 14.

LUJA BAI (PETITIONER), RESPONDENT.*

Criminal Procedure Code—Act V of 1898, s. 195 (4)—Sanction to prosecute.

Clause (4) of section 195 of the Code of Criminal Procedure applies only to cases in which, at the time of granting sanction to prosecute, the offender is uncertain or unknown. Where there is no doubt as to whom the prosecution is to be directed against, the offender should be named.

APPLICATION under section 195, clause (4), of the Code of Criminal Procedure for sanction to prosecute petitioner for forgery.

The District Judge made the following order:—"It is not denied now that the words in the application for probate and in the vakalat, 'this cross is the signature of Luja Bai' were written by the counter-petitioner, though it is not admitted that they were. There is nothing at present on record to show that the counter-

(1) L.R., 8 A.C., 508.

(2) 33 Ch.D., 562.

* Criminal Miscellaneous Petition No. 144 of 1900 praying the High Court to revise the order of J. W. F. Dumergue, District Judge of South Canara, on Civil Miscellaneous Petition No. 224 of 1900.

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v.
LUJA BAI.

petitioner wrote those words but there is strong reason for thinking that the alleged marks were forgeries, and under section 195 (4), Criminal Procedure Code, I sanction the prosecution of the person who committed the forgeries for an offence punishable under section 465 of the Indian Penal Code."

Against this order, petitioner preferred this criminal revision petition.

Ayya Ayyar for petitioner.

K. Narayana Rao for respondent

The Public Prosecutor (Mr. *E. B. Powell*) for the Crown.

JUDGMENT—As the petitioner was not "a party to the proceeding in the Court" in the case in which the alleged forged will was produced, no sanction for his prosecution was required. Therefore the Judge was not competent to entertain the application for sanction. Even if he had been, he should have named the person against whom the prosecution was to be directed, as there was no doubt about who that person was. Clause (4) of section 195 of the Code of Criminal Procedure obviously applies only to cases where, at the time of granting sanction, the offender is uncertain or unknown.

The sanction in this case must therefore be revoked.

APPELLATE CIVIL.

Before Mr. Justice Datus and Mr. Justice Bhashyam Ayyangar.

1902
February
20.

MEIYYALU NADAN (PLAINTIFF), APPELLANT,

v.

ANJALAY AND ANOTHER (DEFENDANTS), RESPONDENTS *

*Registration Act - Act III of 1877, s. 17—Deed of gift of immovable property—
registration by legal representative after death of donor—Validity of gift.*

The voluntary registration of a deed of gift by the legal representative of the donor has the same effect as its voluntary registration by the donor himself in his life-time.

* Second Appeal No. 1183 of 1900 against the decree of K. Ramachandra Ayyar, Subordinate Judge of Negapatam, in Appeal Suit No. 695 of 1889 presented against the decree of V. Coopposwami Ayyar, District Munsif of Tiruturai pundi, in Original Suit No. 75 of 1899.

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NADAN
v.
ANJALAY.

SUIT for a declaration that a certain house was liable under a decree which had been obtained by plaintiff against first defendant. The plaintiff stated that when the house in question was attached by plaintiff second defendant filed a claim petition, in consequence of which the house was released from attachment. Plaintiff now brought this suit, and contended that the house had belonged to the husband of first defendant, and that first defendant had enjoyed it since her husband's death; also, that the right set up by second defendant her daughter, was not legally complete, and that the house was therefore liable to the claim. First defendant was *ex parte*. Second defendant claimed that the house had been given to her by her deceased father, and that the deed of gift had been registered. The District Munsif found that the deed had not been registered or presented for registration by the father during his lifetime, and that it had been registered after his death, on presentation of the document by his widow, the first defendant. He held that possession of the property could not pass till registration of it was effected, and that the gift was inoperative. He made the declaration. On appeal, the Subordinate Judge said:—"The object of registration is to secure legal efficacy to the transaction and it can be effected by the executant or by his heir-at-law. Section 25 of the Contract Act enjoins registration under the law for the registration of documents,—and Act III of 1877, the Registration Act, does not say that, unless registration by the executant is effected, such deeds lose efficacy. Section 123 of the Transfer of Property Act requires a gift to be effected by a registered instrument signed by the donor. There is nothing here to require the donor himself to effect registration as the only means of rendering the deed valid. There is no difference in the language used in section 59, relating to registering a mortgage deed for Rs. 100 and more, and that in section 123,—and that a mortgage deed could be registered after the executant's death by the heir-at-law admits of no doubt. Right to claim specific performance in the one case and not in the other is based upon consideration and no consideration respectively and not upon who effected registration of the particular deed The deed of gift reads as a will coupled with language of immediate delivery and of protection of the executant and his wife by the beneficiary and is drawn upon a stamp of Rs. 10 value. But it was virtually a deed of gift with a burden or a settlement. Second defendant was the only child of her parents, and a maiden daughter

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living with them, married only four or five months after father's death. Her possession therefore commenced, so to speak, from the time of the deed and she has been living in the house included in the gift ever since." He reversed the District Munsif's decree and dismissed the suit.

Plaintiff preferred this second appeal.

A. J. Ambrose for appellant.

V. Krishnaswami Aiyar for second respondent.

JUDGMENT.—The voluntary registration of the deed of gift by the legal representative of the donor has the same effect as its voluntary registration by the donor himself in his life-time. There was, therefore, a valid gift to the second defendant.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Moore.

1901.
December 5.

APPATHURA PATTAR (PLAINTIFF), APPELLANT,

v.

GOPALA PANIKKAR (DEFENDANT), RESPONDENT.*

Evidence Act—Act I of 1872, ss. 63, 65, 90, 114—Copy of document—No evidence that original could not be produced—Secondary evidence—Presumption.

In a suit to recover possession of land, the defendant relied principally on a document which was filed in the Munsif's Court in support of his title. According to the evidence this document had been prepared with reference to a document of an earlier date. This earlier document was not produced, though it was admittedly in existence, nor was it shown that it could not have been produced. The Munsif decreed in plaintiff's favour. On appeal, a copy of the earlier document was produced and filed.

Held, that although the exhibit was admissible as secondary evidence, it was only secondary evidence of the contents of a document. There was no evidence that the document, of the contents of which the exhibit was evidence, was in fact executed in 1862 between the parties mentioned, and inasmuch as the exhibit was a copy and not the original, the presumption which, under section 90

* Second Appeal No. 725 of 1900 against the decree of K. Krishna Rao, Subordinate Judge of South Malabar, in Appeal Suit No. 450 of 1899, reversing the decree of N. Subba Ayyar, District Munsif of Temelprom, in Original Suit No. 73 of 1898.

of the Evidence Act, may be made where a document over thirty years old is produced, ought not to be made.

Khetter Chunder Mookerjee v Khetter Paul Sreeterutno, (I.L.R., 5 Calc., 886), referred to.

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Suit for possession of a paramba and for money. Plaintiff claimed to be entitled to the paramba on a perpetual service grant and to the improvements thereon. He alleged that defendant had forcibly entered the paramba and cut and removed timber from it and he sued to eject him and to recover possession, and claimed the value of the trees which, as he alleged, defendant had cut. Defendant denied plaintiff's claim to the paramba, as well as the alleged trespass. He pleaded that the paramba had been assigned to him and was in his possession and that if it had been demised to plaintiff, the demise was fraudulent. He further claimed that the suit was barred by time, and by adverse possession. At the hearing before the Munsif, a document, being a registered kanom deed executed in the year 1060, was filed as exhibit XIV, and was strongly relied on by the defendant. It contained a reference to a water-course as forming the eastern boundary of the paramba and it was on this that defendant principally relied in proof of his claim. The Munsif said that exhibit XIV was of great importance, because all the other documents filed by defendant which had come into existence subsequently to exhibit XIV depended upon it for the information they contained, the reference in it to the water-course as the eastern boundary appearing in that document for the first time. Defendant, in his cross-examination, stated that he had known the paramba from the year 1060, which was the year in which exhibit XIV had been executed. He was at that time employed under the Zamorin and went to the paramba and noted its boundaries. He also stated that he had prepared the renewal deed, the draft of it being made with reference to a prior deed of 1033 or 1038. The prior deed of 1033 was produced and filed as exhibit VIII; and did not mention the water-course as the eastern boundary of the paramba. But the deed of 1038 was not produced before the Munsif. It was not shown that the document could not be produced. On the contrary, it was admitted to be in existence and in the custody of the Zamorin. The Munsif inferred from its non-production that no mention was made in it of the water-course as the eastern boundary of the paramba. Considering the effect of exhibit XIV,

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he thought that the circumstances under which the material portion of it had been introduced, describing the water-course as the eastern boundary, and defendant's own connection with its introduction, rendered the document on that point suspicious. He believed plaintiff's documents and distrusted exhibit XIV, and attached no weight to defendant's other documents, as they merely reproduced the reference to the water-course from exhibit XIV. In the result, he passed a decree directing defendant to deliver up the paramba to plaintiff, and to pay the value of the timber which had been cut

Defendant appealed to the Subordinate Judge, who thus referred to the Munsif's comments on exhibit XIV :—" He remarks that the earlier kanom document of 1038, which was stated by the defendant to have been referred to in drawing up exhibit XIV, had not been produced. The document is now found to have been filed in an important suit in the Palghat Sub-Court, and the Zamorin, who had filed it and who belongs to the Kilake Kovilagam which is the grantor to the plaintiff, was said to be in no mood to get it back and file it for the benefit of the defendant. Now, however, the defendant is able to obtain a copy of it and has filed it as exhibit XV. Even the copy was obtained in 1889 when this present dispute had evidently not arisen. Exhibit XV distinctly mentions the water-course as the eastern boundary of the defendant's holding and so supports exhibit XIV. The two documents XIV and XV, by the mention of the water-course marked D on the plan, make it clear that the plaint ground belongs to the defendant." He also found in defendant's favour on the question of possession. He reversed the decree and dismissed the suit.

Plaintiff preferred this second appeal.

Sundara Ayyar for appellant.

J. L. Rosario and *Bhashara Menon* for respondent.

JUDGMENT — We think the Subordinate Judge was wrong in admitting exhibit XV in evidence as proving that in 1862 a deed was in fact executed by the parties referred to, and in the terms set out, in that exhibit. In the circumstances, exhibit XV was admissible as secondary evidence under the provisions of sections 63 and 65 of the Evidence Act. But it is only secondary evidence of the contents of a document. There is no evidence that the document, of the contents of which the exhibit is evidence, was in fact executed in 1862 between the parties mentioned, and in the

terms stated in the exhibit. No doubt the document of which exhibit XV is a copy purports to have been executed in 1862 and therefore purports to be more than thirty years old, but it is not produced, and this being so, we think the presumption which, under section 90 of the Evidence Act, may be made where a document over thirty years old is produced from proper custody, ought not to be made. It is not necessary to consider whether we should be prepared to follow the decision in *Khetter Chunder Mookerjee v. Khetter Paul Sreeterutno*(1), if it had been shown, as it was in that case, that the original document could not be produced by reason of its having been lost. In the present case there is nothing to show that the original document, which admittedly is in existence, and in the custody of the Zamorin, could not have been produced if proper steps to procure its production had been taken. It has been argued that section 114 of the Evidence Act enables us to make the presumption of the genuineness of the original document; but the law as to the presumptions which may be made in the case of documentary evidence is laid down in the sections which deal with documentary evidence, and section 114 has no application to a case of this sort. Apart, however, from the evidence of title the Judge states that he believes the oral evidence as to twelve years' possession by the defendant and disbelieves the plaintiff's evidence of possession. On the question of possession there is, therefore, a finding of fact in defendant's favour with which we cannot interfere on second appeal

The second appeal is dismissed with costs

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(1) I L.R., 5 Cal., 886.

PRIVY COUNCIL.

P.C.*
1902.
April 30.
May 1.
June 18.

VENKAYYAMMA GARU (WIDOW AND REPRESENTATIVE OF APPA
RAO BAHADUR GARU), PLAINTIFF IN SUIT No. 12 of 1893,

v.

VENKATARAMANAYYAMMA BAHADUR GARU (DEFENDANT
IN SUIT No. 12 of 1893)

AND

VENKATARAMANAYYAMMA BAHADUR GARU (PLAINTIFF IN
SUIT No. 8 of 1893),

v.

VENKAYYAMMA GARU (DEFENDANT IN SUIT No. 8 of 1893).

TWO APPEALS CONSOLIDATED.

[On appeal from the High Court of Judicature at Madras.]

Hindu Law—Inheritance—Mitakshara Law—Interest taken by daughters' sons in self-acquired property of grandfather—Survivorship—Revocation of Hindu will—Appeal to Privy Council—Printing of unnecessary matter in record

Actual destruction or a formal revocation in writing is not essential to constitute revocation of a Hindu will which does not depend on any English Ordinance or Code. Under the Mitakshara Law a daughter succeeding to the self-acquired property of her father takes a limited and restricted estate only, and such property does not become her *stridhan*.

Chotay Lal v. Chunnoo Lal, (1878) 1 L.R., 4 Calc., 744, L.R., 6 I.A., 15, and *Mattu Vaduganadha Terar v. Dorasinga Terar*, (1881) 1 L.R., 3 Mad., 290, L.R., 8 I.A., 99, followed.

On the death of the daughter her sons therefore succeeded to the property as heirs of their grandfather, and, there having been no partition between them, they took it as ancestral property which had devolved upon them as members of a united family under the ordinary law of inheritance, viz., jointly with right of survivorship. It is the right to partition which determines the right to take by survivorship, and where there has been no partition the survivor takes.

According to the Mitakshara Law the doctrine of survivorship is not limited to unobstructed succession and to the succession to the joint property of re-united co-parceners.

Jasoda Koer v. Sheo Pershad Singh, (1889) 1 L.R., 17 Calc., 33, and *Sammadha Pillai v. Thangathamm*, (1895) 1 L.R., 19 Mad., 70, overruled.

* PRESENT: LORD MACNAGHTEN, LORD LINDLEY, SIR FORD NORTH, SIR ANDREW SCOTTE and SIR ARTHUR WILSON.

The Judicial Committee expressed their strong disapproval of the unnecessary expense incurred in this case owing to the printing in the record of a large quantity of matter which was useless for the purpose of the appeal, characterizing such extravagance as an abuse of the rights of suitors, whether appellants or respondents, and suggesting the propriety of the High Court in India exercising its jurisdiction over those who conduct litigation and prepare appeals from its decisions, and taking such steps as might be practicable to compel those who were to blame to pay the costs unnecessarily incurred.

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Two appeals consolidated from a decision (25th February 1897) of the High Court at Madras by which a decision (15th March 1895) of the District Judge of Godavari in a suit brought by the appellant in the first appeal was modified, and a decision of the same date and by the same District Judge in a suit brought by the appellant in the second appeal was reversed.

The two original suits were numbered 8 and 12 of 1893. The former was brought by Venkataramanayamma, widow of one Niladri, against his brother Appa Rao to establish her right to the whole or, in the alternative to half, of the property which had descended to the brothers from their maternal grandfather Venkat Rao. The latter suit was brought by Appa Rao against Venkataramanayamma to set aside a will alleged to have been made by Niladri which formed part of the title relied on by her. Venkat Rao died in July 1869 and on his death his property descended to his widow, and on her death in July 1875 to his daughter and in each case was held by them for the usual widow's estate. On the death of the daughter in 1884 the estate passed to and was registered in the names of her sons Niladri and Appa Rao though their father Sami Royanin Guru continued to manage the estate for the sons as he had done during the lives of their mother and grandmother. On the death of Niladri on 3rd September 1892 his widow put forward a will alleged to have been executed by him on the previous day. This will was at first recognized by Appa Rao and he joined the widow in applying to the Revenue authorities that her name should be substituted for that of her husband on the register and that the estate should be managed jointly. Very shortly afterwards he repudiated the will and took possession of the entire estate to the exclusion of the widow. Upon this she on 18th February 1893, instituted suit 8 of 1893, in the plaint in which she founded her claim on two allegations;—*First*;—that Venkat Rao died leaving a will made on 7th September 1866 by which he appointed his wife as his heiress

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after his death, and his daughter and his grandson Niladri Rao as heirs after her death; "and they should therefore continue to enjoy the estate as they please," and that by virtue of their arrangement Niladri became exclusive owner of the whole property on the death of his mother in 1884, though from his being unaware of the arrangement, the estate was registered in the joint names of Niladri and Appa Rao. *Second*;—that on 2nd September 1892 Niladri, her husband, executed a will providing that his widow should after his death become entitled to and manage the whole of his property like himself, that she should take in adoption a boy of her own choice, that she should give to his daughters out of his estate a village yielding Rs 6,000 a year, and that if she should not like to manage jointly with the defendant Appa Rao she should get the estate sub-divided and she and her adopted son enjoy one moiety thereof.

Appa Rao in his written statement asserted that the will of Venkat Rao had been revoked and cancelled before his death, and was never acted upon, and that the will did not create any line of devolution, but merely declared the mode in which the estate would descend by Hindu Law. He also alleged that the conduct of Niladri in recognizing his brother's rights in 1884 was the result not of his ignorance of the will, but of his knowledge that it had never taken effect. As to the second allegation he said he was at first led to believe that Niladri had made a will, but afterwards found that he had been deceived. He denied the existence of any such will and asserted that he had been enjoying the properties in dispute jointly with his elder brother, and that on Niladri's death the whole vested in him by survivorship.

The issues, so far as they are now material, were—

- (1) Whether Venkat Rao's will was revoked.
- (2) Whether, if not revoked, it conferred upon Niladri Rao any rights different from those he would have had by Hindu Law.
- (3) Whether under the will Niladri took the whole estate, or less.
- (4) Whether, if Niladri did not take the whole estate, he and his brother Appa Rao became entitled to it as joint tenants with benefit of survivorship, or as tenants in common.

(7) Whether, if a tenancy in common, it was treated by the parties interested, and became, a joint property with survivorship

(8) Whether the alleged will of Niladri Rao is genuine and valid

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The whole of the questions between the parties were by agreement tried on the pleadings and issues in suit 8 of 1893.

The District Judge held that Venkat Rao's will was revoked by him; and that, even if unrevoked, it was not intended to alter the devolution of the property according to Hindu Law, and that it would not have excluded Appa Rao. Upon the fourth and seventh issues he did not decide the question of law but held that as a matter of fact the two brothers had thrown their estates into co-parcenary. Upon the eighth issue he found that the will of Niladri was not genuine.

The result was that suit 8 of 1893 was dismissed, and suit 12 of 1893 was decreed.

The plaintiff in the former suit appealed to the High Court on all the questions of law and fact decided against her.

The High Court (SUBRAMANIA AYYAR and BENSON, JJ.) upheld the finding of the District Judge that the will of Venkat Rao had been revoked. The questions of law as to the effect to be ascribed to it, if still in force, were not considered. Upon the question of the nature of the estate taken by the brothers in the property which descended from their maternal grandfather, they held that it was not a joint estate with survivorship. On the question of fact whether the property had been held by the brothers as joint tenants and not as tenants in common, the Court, differing from the District Judge, held "that the only fair inference to be drawn from the facts, taking them all together, is that the brothers did not feel any necessity for dividing either the corpus or the income, and found it convenient for the time being to live together and manage their property in common. For these reasons we must hold that the second ground in regard to survivorship also fails, and consequently Niladri's moiety passed to the plaintiff as his widow and heir."

As to Niladri's will the High Court agreed with the District Judge in holding that it was not genuine. The result was that in suit 8 of 1893, the decree of the District Judge was reversed, and a

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partition was ordered, and delivery of possession of one of the two shares to the plaintiff with mesne profits.

The judgment of the High Court is reported in I L.R., 20 Mad , 207.

Against the High Court decision both parties appealed, Appa Rao claiming the whole estate on the principle of survivorship, and Venkataramanayamma claiming the whole under the will of Venkat Rao. Appa Rao's appeal is numbered as Privy Council Appeal I of 1900, and Venkataramanayamma's appeal as 57 of 1900.

Appa Rao died on 27th July 1901 pending these appeals, and Venkayamma his widow was, by order of revivor, substituted for him on the record.

Mr. *J. D. Mayne* for the appellant in appeal I of 1900, and for the respondent in appeal 57 of 1900.

Mr. *James Jardine* K.C., and Mr. *A. Phillips* for the appellant in appeal 57 of 1900 and respondent in appeal I of 1900.

Mr. *Mayne* (in appeal I of 1900) contended that the two brothers Niladri Rao and Appa Rao took the property as joint tenants and inherited it as joint property with right of survivorship; and that if it should be held that they took it as tenants in common the evidence proved that they intended to hold and did in fact hold, the entire property, after it devolved upon them, as joint property, and not as separate property but with undivided shares. Daughters' sons take an obstructed heritage. Takers of obstructed inheritance are joint tenants if in the same generation; then, survivorship follows. Here, therefore, it is submitted, there was survivorship notwithstanding the inheritance was obstructed. The cases which are referred to by the High Court as deciding that daughters' sons take as tenants in common without right of survivorship (*Gopalasami v. Chinmasami*(1), *Jasoda Koer v. Sheo Pershad Singh*(2) and *Sannadha Pillai v. Thangathanni*(3)), are wrongly decided. There is a number of cases in which self-acquired property has descended in that way and has been inherited as joint with right of survivorship. Sons succeeding to the self-acquired property of their father with whom they formed a joint family under Mitakshara Law take it as obstructed property; but in their hands it

(1) (1884) I L R., 7 Mad., 458 (2) (1889) I L R., 17 Calc., 33 (34).
(3) (1895) I L R., 19 Mad., 70 (72).

becomes joint with right of survivorship (*Ram Naram Singh v. Pertum Singh*(1), *Chatturbhoj Mighi v. Dharamsi Naranyi*(2)). Property granted to two members of an undivided family has been held to be taken as joint property with survivorship (*Rudhabai v. Nanarao*(3), *Sham Naram v. Court of Wards*(4)). If several widows or daughters take together they take jointly with survivorship (*Bhuvandeem Doobey v. Myna Bace*(5), *Jyoyamba Bai Saiba v. Kamakshi Bai Saiba*(6), *Gajapathi Nilamani v. Gajapathi Radhamani*(7), *Aumirtolall Bose v. Rajoneekant Mitter*(8), *Gajapathi Radhamani Garu v. Pusapati Alakjeswari*(9)). These authorities show that all unobstructed property is taken jointly with survivorship; but that the converse, viz, that all property which is taken jointly with survivorship must have been unobstructed property is unsound. As to the intention of the two brothers to hold the property jointly, which it was submitted was shown by the evidence to be the case, *Appovier v. Ruma Subba Aiyar*(10) per Lord Westbury, and *Setrucharla Ramabhadra v. Setrucherlu Virabhadra*(11) were referred to.

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In appeal 57 of 1900 Mr. Mayne contended that Venkat Rao intended to revoke, and did in fact revoke his will, and that that being the concurrent finding of two Courts ought not to be disturbed.

Mr James Jardine, K.C., and Mr. A Phillips for the respondent in appeal I of 1900 contended that the nature of the interest taken in self-acquired property of their grandfather by daughter's sons on their mother's death was rightly decided by the High Court on the authority of the cases of (*Gopulasami v. Chinmasami*(12), *Jasoda Kver v. Sheo Pershad Singh*(13), and *Sammadha Pillai v. Thangathanmi*(14)). The conclusion is that they take separate and independent estates without the incident of survivorship. The Mitakshara, chapter I, section 1, verse 27 and chapter II, section 7, and the

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- (1) (1873) 20 W R, 189 (191), 11 B L R, 397 (403)
 (2) (1884) I L R, 9 Bom, 438 (450) (3) (1879) I L R, 3 Bom, 151.
 (4) (1873) 20 W R, 197 (201) (5) (1867) 11 Moores I.A, 487 (514).
 (6) (1868) 3 Mad., H C, 424 (452)
 (7) (1877) L R, 1 I A, 212, I L R, 1 Mad, 290
 (8) (1875) L R, 2 I A, 113 (126), 15 B L R, 10 (24).
 (9) (1892) L R, 12 I A, 184, I L R, 16 Mad, 1
 (10) (1866) 11 Moores I.A, 75 (89)
 (11) (1899) L R, 26 I A, 167; I L R, 22 Mad, 470.
 (12) (1884) I L R, 7 Mad, 458. (13) (1889) I L R, 17 Calc, 33 (34).
 (14) (1895) I L R, 19 Mad, 70 (72).

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case of *Radhabai v. Nanarao*(1) were referred to. There is no authority for saying that such property adopts itself, so far as survivorship is concerned, to the various members of a family to whom it may descend; suppose a case, for instance, of several daughters having sons some of whom were joint and others separate. Two distinctive kinds of property cannot be assimilated because they come to the same set of descendants *Sudarsanam Maistri v. Narasimhulu Maistri*(2) was referred to

In appeal 57 of 1900 it was contended that the evidence as to the revocation of the will of Venkat Rao was not sufficient to show that he intended to or did revoke it. Though the conclusions of two Courts were concurrent as to the fact of revocation, each Court based its conclusion on grounds materially different, and were at variance as to important facts.

Mr. Mayne replied.

The judgment of their Lordships was delivered by Lord Lindley.

JUDGMENT—A Hindu gentleman named Venkat Rao living in the Province of Madras where the Mitakshara Law prevails died in 1869 leaving one widow who died in July 1875 and one daughter who died in 1884. He left no other widow and no descendant except his daughter and her issue. His daughter married and left two sons, viz., Niladri and Appa Rao. Niladri was born in his grandfather's lifetime and died in 1892; Appa Rao was born after his grandfather's death and died in 1901. Venkat Rao's property was his own separate property. The litigation which has culminated in these appeals is between persons claiming under these two brothers, grandsons of Venkat Rao; and the main questions raised on the appeals and which their Lordships have to determine are as follows, viz. :—

1. Did Venkat Rao leave a will, or did he die intestate?
2. If he died intestate did his property descend on the death of his daughter to her two sons jointly with benefit of survivorship or jointly or in common without benefit of survivorship? In the latter case Niladri's share would on his death devolve on his widow and children.

There was a subordinate question relating to a supposed will of Niladri in favour of his widow but this will was found to be a

(1) (1879) I.L.R., 3 Bom., 151.

(2) (1901) I.L.R., 25 Mad., 149.

forgery by two Courts in Madras, and it has not been seriously contended before their Lordships that this alleged will can be now relied upon. No further allusion will therefore be made to it.

As regards the first question it is clearly proved that Venkat Rao made a will disposing of his property in favour of his wife for her life and after her death in favour of his daughter for her life and after her death in favour of his grandson by her, *ie*, Niladri. This will was made in 1866 when Venkat Rao was ill; it was put into an envelope and was deposited and registered in the office of the District Registrar where it remained until he died. Venkat Rao however recovered from his illness and in 1867 he executed a power-of-attorney appointing a vakil to obtain the will out of the Registry and to restore it to him. Owing to some blunder this was not done. Venkat Rao's intention to get his will back into his own possession and not to leave it as it was cannot be doubted. There is some evidence to show that he believed he had destroyed it. He certainly cancelled some grants of land recited in it. Persons existed whose interest it was to claim under it but no one ever did so although it is difficult to believe that none of them knew of it. For nearly 30 years no one ever thought of asserting any claim under it. The revocation of this will does not depend on any English Ordinance or Code; and actual destruction or a formal revocation in writing are not essential to constitute revocation (see *Pertab Narain Singh v. Subhao Koor*(1)) at page 245 of the report in 4 I.A. The District Judge who saw the witnesses came to the conclusion that the will was revoked and his decision has been affirmed by the High Court.

After carefully considering the evidence their Lordships are not prepared to advise His Majesty that their decision on this point ought to be reversed. The will must therefore be treated as revoked.

The next question which arises is whether the two grandsons took jointly with benefit of survivorship or whether each took an undivided share which on his death devolved upon his representatives or assigns. Upon this question the Courts below have differed. The District Judge held that they were joint owners with benefit of survivorship. He did not decide that they acquired the property as joint owners but he held that they had

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1) (1877) L R. 4 I.A., 228 (245), I.L.R., 3 Calc., 626 (643).

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so dealt with it as to show that it was joint property. The High Court held that they succeeded as owners in common without benefit of survivorship and that they never ceased so to hold it. The High Court followed a previous decision of the High Court of Calcutta in *Jasoda Koer v. Sheo Pershad Singh*(1), the correctness of which was strenuously denied by Mr. Mayne and must be considered.

The law of inheritance in the case of women is left in great obscurity by the Mitakshara. The subject is dealt with in chapter II, section 11, and has more than once been considered by this Board. The nature of a widow's estate was settled in two cases (*Thakoor Dayhee v. Baluk Raw*(2) and *Bhugwandeem Doobey v. Myna Baee*(3)); and the nature of a daughter's estate was considered in *Chotay Lal v. Chunno Lal*(4). It was there decided that under the law of the Mitakshara a daughter's estate inherited from the father is a limited and restricted estate only and not stridhan. Upon her death the next heirs of her father succeed thereto. In *Muttu Vaduganadha Tevar v. Dora Singha Tevar*(5) the same principle was applied to cases in Madras governed by the Mitakshara Law. Their Lordships therefore consider it conclusively established that, in this case, Niladri and Appa Rao, on their mother's death, succeeded as heirs to their grandfather's estate.

What then was the character of the property which they took? In the grandfather's hands it was separately acquired property. In the hands of the grandsons it was ancestral property which had devolved on them under the ordinary law of inheritance. Niladri and Appa Rao were members of a united family.

"According to the principles of Hindu Law, there is co-parcenaryship between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession" (*Katama*

(1) (1889) I.L.R., 17 Calc., 33.

(2) (1866) 11 Moore's I.A., 139.

(3) (1867) 11 Moore's I.A., 487.

(4) (1878) L.R., 6 I.A., 15, I.L.R., 4 Calc., 744.

(5) (1881) I.L.R., 3 Mad., 290, L.R., 8 I.A., 99.

Natchiar v. The Rajah of Shivagunga(1)). It is true that on acceding to their grandfather's property, Niladri and Appa Rao might have partitioned it, but they did not do so. It is the right to partition which determines the right to take by survivorship; and where there is no partition the survivor takes.

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The High Court have proceeded on the principle that although persons who succeed to joint family property take jointly if their inheritance is unobstructed yet that in cases of obstructed inheritances those who succeed take as tenants in common and not as joint tenants. But the authorities referred to by Mr. Mayne in his very able argument show that this last proposition is by no means universally true. Members of a joint family who succeed to self-acquired property take it jointly (*Ram Narain Singh v. Pertum Singh*(2)) and see (*Rampershad Tewary v. Sheochurn Doss*(3)); but it may be that where sons succeed the inheritance as to them is unobstructed. Widows succeed jointly (*The Tanjore case*(4), *Bhugwandeem Doobey v. Myna Bae*(5) and *Gajapathi Nilamani Patta Deo v. Gajapathi Radhamani Patta Deo*(6)); so do daughters (*Aumirtolall Bose v. Rajoneekant Mitter*(7)) and see (*Muttu Vizia Ragunada, &c., v. Dorasinga Tevar*(8)).

In *Jasoda Koer v. Sheo Pershad Singh*(9), the High Court of Calcutta certainly decided that the sons of a daughter (she being the only child) succeeded to their grandfather's property in undivided moieties and not jointly with benefit of survivorship. This decision was in 1889; it was followed in 1895 by the High Court of Madras in *Saminadha Pillai v. Thangathanni*(10). The decision of the High Court now under appeal is based upon these authorities. The Calcutta decision appears to their Lordships to have been based upon a view of Mitakshara Law which further investigation shows to be erroneous, viz., upon the view that according to the Mitakshara Law the doctrine of survivorship is limited to unobstructed successions and to the succession to the joint property of re-united co-parceners. No authority for such a limitation can

(1) (1863) 9 Mooe's I.A., 539 (611). (2) (1873) 20 W.R., 189, 11 B.L.R., 397
(3) (1866) 10 Mooe's I.A., 490. (4) (1868) 3 Mad., H.C., 424.
(5) (1867) 11 Mooe's I.A., 487 (514, 515).
(6) (1877) L.R., 4 I.A., 212 (221); 1 L.R., 1 Mad., 290 (299).
(7) (1875) L.R., 2 I.A., 113 (126); 15 B.L.R., 10 (24).
(8) (1871) 6 Mad., H.C., 310. (9) (1889) I.L.R., 17 Calc., 33.
(10) (1895) I.L.R., 19 Mad., 70.

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be found anterior to the Calcutta case. The only previous decision directly in point is *Gopulasami v. Chinnasami*(1), where the two sons of a daughter were held to be jointly entitled to their grandfather's property; but the decision was based on the way they had dealt with the property rather than on the title they acquired on succession. The headnote is rather misleading on this point. The authorities to which their Lordships have referred, and others cited by Mr. Mayne and which their Lordships have examined, although not directly in point are clearly opposed to the general doctrine laid down in the Calcutta case.

It does not follow that because the reasons given for a decision are unsatisfactory the decision itself is erroneous. But in this case the decision in question appears to their Lordships to be opposed to the principles which regulate the devolution of joint family property to which the Mitakshara Law is applicable and they therefore cannot adopt the decision in *Jasoda Koer v. Sheo Pershad Singh*(2). They think it erroneous. The decision in *Saminadha Pillai v. Thangathanm*(3) and the decision appealed from are both based upon it and are open to the same objections.

In the result therefore their Lordships agree with the District Judge. He however considered that the conduct of the parties and the mode in which the grandsons dealt with and enjoyed the property were sufficient to decide the case. But their Lordships do not think that the evidence so unmistakably negatives ownership in common as distinguished from joint ownership as to render it safe to decide the case on this ground alone. There is certainly nothing in the evidence which supports the view that the grandsons held the property in common rather than jointly: there is no separate dealing with any share. It is not suggested that if they succeeded jointly they ever ceased to hold it in the same way. The property was treated and dealt with as a whole and so far joint ownership rather than ownership in common is the more probable. After their mother's death and whilst their father was living Niladri managed the whole property and acted as his brothers's guardian during his minority which would hardly have been the case if the brothers had their separate interests in undivided shares. But there is nothing so clearly decisive either way

(1) (1881) I L.R., 7 Mad., 458.

(2) (1889) I L.R., 17 Cal., 33.

(3) (1895) I L.R., 19 Mad., 70.

as to render it unnecessary in their Lordship's opinion to decide the nature of the ownership which was acquired by the grandsons when they succeeded to the property. It is however satisfactory to find that the decision arrived at is in complete accordance with the mode in which the property has been dealt with by the family as long as Niladri was alive.

Their Lordships will therefore humbly advise His Majesty to dismiss the plaintiff's cross-appeal (57 of 1900) setting up the will of Venkat Rao and to allow the defendant's appeal (1 of 1900) and to dismiss the plaintiff's appeal to the High Court with costs and to reverse the decree of the High Court so far as it is inconsistent with the decree of the District Judge and to restore that decree and to remit the suit (No. 8 of 1893) whence these appeals arise to the High Court for the purpose of executing or causing to be executed the decree of the District Judge and the order made on these appeals.

It remains only to deal with the costs of the appeals. These must be paid by the plaintiff, who has failed. But their Lordships cannot refrain from expressing their strong disapprobation of the expense which has been unnecessarily incurred in this case. A joint appendix of moderate dimensions would have been ample for all the purposes of these appeals. The appellant's legal advisers in India appear to have endeavoured but unsuccessfully to reduce the bulk of matter to be printed. But instead of an appendix containing no more than was necessary several volumes of over 1,000 pages each have been translated and printed at vast expense, setting out accounts running over many years which it was wholly unnecessary to print and which no one has referred to. Their Lordships regard such reckless extravagance as an abuse of the rights of suitors whether appellants or respondents. The parties to blame are in India and their Lordships have no power to ascertain who they are nor to make them responsible for the abuse. Their Lordships will do what they can. They will call the attention of the High Court of Madras to the case and suggest to them the propriety of exercising their jurisdiction over those who conduct litigation and prepare appeals from their decisions and of taking such steps as may be practicable to compel those who are to blame in this instance to pay the costs unnecessarily incurred. If nothing can be done under existing regulations rules should be made to check such gross abuses. Their Lordships will direct the

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Registrar in taxing the costs to take no account of any of the volumes except the two which were bound and used at the hearing, and not to allow more in respect of them than he thinks fair and reasonable.

Appeal I of 1900 allowed Appeal 57 of 1900 dismissed.

Solicitor for the appellant in I of 1900 and respondent in 57 of 1900—Mr. R. T. Tasher.

Solicitor for the respondent in I of 1900 and appellant 57 of 1900—Messrs Lauford, Waterhouse, & Lauford.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

1902
February
6, 13, 26.
August 28

AIYYAGARI VENKATARAMAYYA AND ANOTHER (DEFENDANTS
Nos. 1 AND 2, APPELLANTS,

v.

AIYYAGARI RAMAYYA (PLAINTIFF), RESPONDENT.*

Hindu Law—Purchase from member of an undivided family—Undivided share of vendor in land forming part of the joint estate—Death of vendor—Subsequent suit by purchaser against survivors for partition of entire estate, for recovery of the portion purchased—Maintainability

Plaintiff purchased 2 acres and 26 cents of land from V, being V's undivided moiety in two plots of land measuring 4 acres and 52 cents, which formed part of the joint property of an undivided Hindu family consisting of V and his two nephews (brother's sons). V subsequently died, leaving his two nephews him surviving. After V's decease, plaintiff instituted the present suit against the nephews, in which he claimed partition of the whole of the family property and sought thereby to recover out of the half share which might fall to his vendor, V (now deceased), the specific 2 acres and 26 cents which he bought from V or land of similar size and quality.

Held, that the suit was maintainable.

Per BHASHYAM AYYANGAR, J.—Plaintiff was entitled to recover, by partition, a moiety of the plots of land in question if such moiety could have been equitably allotted to the plaintiff's vendor's share in case a partition of all the family

* Appeal against Order No 106 of 1901, against the order of the District Court of Godavari, dated 15th February 1901, in Appeal Suit No 222 of 1900 presented against the decree of the Court of the District Munsif of Tanuku, in Original Suit No. 589 of 1898.

property, between him and his nephews, had been effected immediately before the sale to the plaintiff

Observations by Bhashyam Ayyangar, J, on the character and incidents of an alienation, made by an undivided member of a Hindu family, of his share and interest therein

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Rangasami v Krishnayyan, (I L R, 14 Mad, 408), considered.

Suit for partition Aiyagari Virrazu, the senior paternal uncle of defendants Nos 1 and 2, and the husband of defendant No 3, on 14th November 1886, sold to plaintiff 2 acres 26 cents of land, being his half share in two plots Nos. 46 and 559, containing, together, 4 acres 52 cents Aiyagari Virrazu subsequently died. After his decease, plaintiff filed Original Suit No 392 of 1889, in the District Munsif's Court at Tanuku, against the present defendants, in which he sought to recover possession of a half share in these two plots of land That suit was ultimately dismissed by the Appellate Court, on the ground that no suit lay for the partition of a portion of the property pertaining to the share of a co-parcener in the joint property of a Hindu family Plaintiff now filed the present suit. The plaint, after setting out the above facts, alleged that "defendants Nos 1 and 2 and the late Virrazu have been living separate for a long time past but were keeping the immovable property joint and were enjoying the yield in equal shares," and claimed, by its prayer, a decree "directing the defendants to divide into two equal shares the joint property belonging to the late Virrazu and to first and second defendants and mentioned in the schedule herewith filed and deliver to plaintiff out of the half share which may fall to Virrazu, 2 acres 26 cents relating to Nos 46 and 559, if they should fall to his share and if they should not, to deliver to plaintiff from out of the property relating to the said half share 2 acres 26 cents of inam land similar in quality to the lands pertaining to the said numbers together with the trees standing thereon" It also claimed mesne profits for the three years immediately preceding suit, subsequent profits till delivery, and other consequent relief. Defendants Nos. 1 and 2 pleaded that Virrazu was an undivided member of the family and that, in consequence, his share, on his death, passed to them by right of survivorship They also contended that the suit was *res judicata*, and impugned the validity of the sale-deed to plaintiff on the ground that it had been obtained by undue influence Defendant No. 3, the widow of the late Virrazu, remained *ex parte*,

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On the question of undue influence, the District Munsif accepted the finding in the previous suit, that the sale was a valid and *bonâ fide* transaction, supported by consideration. On the second issue, as to whether Virrazu had the right to sell his undivided interest, the District Munsif held that though he had the right to sell his undivided interest he had no right to sell a specific portion of the undivided property. On the question of *res judicata* he was of opinion that the suit was barred. His conclusion was as follows:—
“Plaintiff is not entitled to any relief. The late Virrazu having been an undivided co-parcener had no power to sell any specific portion of the undivided family property. And he having died long before the date of the institution of this suit and also before the date of the former suit, the interest which he possessed in the family property passed to the other co-parceners, at his death, by right of survivorship. As, therefore, the vendor himself had no right to the property, much less can the vendee have. On the death of Virrazu, the partition became impossible and consequently the plaintiff is entitled to no remedy.”

Plaintiff appealed to the District Judge, who held that plaintiff, as purchaser of a co-parcener's share in a specified portion of family property, had acquired a right which he could enforce by suit; also, following *Rangasami v. Krishnayyan*(1) and *Alamelu v. Rangasami*(2), that plaintiff was entitled to relief under his sale-deed. He reversed the decree of the lower Court and remanded the suit, under section 562 of the Code of Civil Procedure, for disposal on its merits, the first issue still remaining to be decided. The question of *res judicata* was not raised in the District Court.

Defendants Nos 1 and 2 preferred this appeal against the order of remand.

The case came on for hearing before Davies and Benson, JJ., who made the following order of reference to a Full Bench:—

DAVIES, J.—In November 1886 the plaintiff purchased from one Aiyagari Virrazu 2 acres 26 cents, his undivided half share in two plots of land, forming part of the joint family property of Aiyagari Virrazu and his two nephews, who were entitled to the other half share. The plaintiff's vendor, the said Aiyagari Virrazu, died sometime between November 1886 and 1889 when the plaintiff brought a suit against the two nephews for the

(1) I.L.R., 14 Mad., 408.

(2) I.L.R., 7 Mad., 588.

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partition of the 2 acres 26 cents of land he had purchased from the deceased Aiyyagari Virrazu. That suit was dismissed on the ground that the plaintiff, as a purchaser from a member of an undivided Hindu family of that member's share in a specific portion of the ancestral property, could not sue for a partition of that portion alone (*Venkatarama v. Meera Labai*(1) followed again in *Pakni Konan v. Masakonnan*(2)). The plaintiff now sues on the 13th of November 1898, exactly twelve years from the date of his purchase on the 14th November 1886, for a partition of the whole family property and delivery to him out of the half share which may fall to his vendor, Aiyyagari Virrazu, the specific 2 acres 26 cents that he bought from him or land of similar size and quality. The District Munsif dismissed the suit not only because he considered the matter was *res judicata* but also for the following reasons :—

“The late Virrazu having been an undivided co-parcener had no power to sell any specific portion of the undivided family property. And he having died long before the date of the institution of this suit and also before the date of the former suit, the interest which he possessed in the family property passed to the other co-parceners, at his death, by right of survivorship. As, therefore, the vendor himself had no right to the property, much less can the vendee have. On the death of Virrazu, the partition became impossible and consequently the plaintiff is entitled to no remedy.” The District Judge did not deal with the question of *res judicata* as both sides admitted before him that no such question arose, though that, in my opinion, is doubtful, but on the other ground held that a suit for partition could be brought by the purchaser of a co-parcener's undivided share after the co-parcener's death, referring to two Madras decisions in support of his view. In *Alamelu v. Rengasami* and another(3) it was held by a Division Bench of this Court that a post-nuptial settlement made in favour of his wife by an undivided member of a Hindu family that she was to take his undivided half share on his death, was a valid disposition and that the wife was entitled to a decree for partition of that share after her husband's death. And this finding was arrived at on the analogy that “if a purchaser for value purchased the

(1) I.L.R., 13 Mad., 275.

(2) I.L.R., 20 Mad., 243.

(3) I.L.R., 7 Mad., 588.

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interest of an undivided co-parcener who dies before partition is effected, the contract nevertheless takes effect and the purchaser may apply for partition " But no authority is quoted for this proposition and up to the date of this ruling there appears to be no decision of this or any other High Court, to that effect. In *Rengasami v. Krishnayyan* and others(1) a full Bench of this Court has decided that, when a suit for partition is brought by a purchaser from a member of a joint Hindu family of his share, the share to be awarded to the purchaser is the share to which the vendor would be entitled at the time of the suit, and not at the time of the purchase That decision had reference to a suit brought in the lifetime of the vendor and did not purport to decide that a suit for partition could be brought after the death of the vendor, though no doubt in the judgment of two learned Judges it was contemplated that such a suit would lie, it however being expressly stated that the question was one which did not arise on the facts of the case then before the Court These are the cases on which the District Judge has relied for his decision, and we have been referred to some unreported cases where the right of the purchaser to sue after the death of the co-parcener has been dealt with as settled law without any discussion of the question, or any reference to cases. In my opinion the judgment of the District Munsif is clearly right.

The right of a member of an undivided Hindu family to alienate his share of the family property to which, if a partition took place, he would be individually entitled, has been recognised in this Presidency as settled by a long course of decisions beginning in 1863 (vide *Vasami Grammi v. Ayyasami Grammi*(2); *Venkatachella Pillai v. Chinnaiya Moodahar*(3); *Vitla Butten v. Yamenamma*(4)); but it was at the same time held that the vendor of such share could not transfer "a valid title to any specific portion of the joint family property but only to his beneficial estate as an undivided co-parcener with the incidental right of partition" (*Venkatachella Pillai v. Chinnaiya Moodahar*(3)) So that the first ground of the District Munsif's judgment, namely, that the late Virrazu having been an undivided co-parcener had no power to sell any specific portion of the undivided family property is quite sound. The right given by law would seem to be a right to sell the vendor's

(1) I L.R., 14 Mad., 408

(3) 5 M.H.C.R., 166

(2) 1 M.H.C.R., 471.

(4) 8 M.H.C.R., 6.

share in the family property whatever that share may be found to be at the time of the claim or suit for partition, and not a right to sell a particular share of any specified property. That was the view taken in the Full Bench decision in *Rengasami v Krishnayyan*(1) where it was held that the share to be awarded to the purchaser was to be computed with reference to the state of the joint family property at the time of the suit, and not at the time of the transfer. It was there shown that the purchaser must be taken to have purchased an uncertain and fluctuating interest which is the very reason I would employ for holding with the District Munsif that the right of the purchaser to partition ceases with the death of his vendor, because the right of the purchaser can only be uncertain and fluctuating during the lifetime of his vendor. On his death all uncertainty and fluctuation as to his undivided share are at an end, for his right to share ceases to exist. The quantum of the share to which the purchaser is entitled, according to the Full Bench ruling, is what his vendor would be entitled to at the date of suit. That quantum after the vendor's death is *nil*. The learned Judges who made the reference upon which the Full Bench decision has been come to remarked as follows:—"It was pressed upon us in argument that if this be so, the purchaser might in some cases take nothing, for his vendor might die before anything was done to enforce the purchase, and also that if the purchaser is to be liable to have what he has purchased diminished by changes in the family, he must also have the benefit if such changes should increase the share of his vendor. It seems to us that both these consequences logically follow from the legal position which the alienee occupies, and we do not see that they involve any absurdity. He who purchases the interest of a member of an undivided family in the family property purchases that which is from its nature uncertain, and the purchase must always partake of the nature of a speculative transaction; but he knows perfectly well what he is buying, and is not to be pitied if he gets less than he hoped for, any more than he is to be blamed if he gets more." With these observations I entirely concur, and they serve me for meeting two of the conclusions at which the Bombay High Court have arrived in the case of *Gurulingappa v. Nandappa*(2), if they are to be taken, as it is urged they are, as direct authority

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(2) I.L.R., 21 Bom., 797.

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that such a suit as the present would lie The first conclusion is that "the position of the purchaser of the interest of a Hindu co-parcener in part or whole of the joint estate is very anomalous. It is impossible to work out his rights on an exact logical basis. As it is an equity it must be worked upon equitable principles." Now, the purchaser of the interest of a member of an undivided Hindu family purchases, to repeat the words of the Judges of this Court "that which is from its nature uncertain and the purchase must always partake of the nature of a speculative transaction" He buys a right which he knows can only be converted into definite separate property by a partition and he knows that the right of his vendor to a partition exists only so long as his vendor lives There is no doubt that during the lifetime of his vendor the purchaser is standing in his vendor's shoes as regards the right to partition But it is said that after his vendor's death the purchaser gets an independent right to partition on equitable principles. But with due deference to the learned Judges who decided the case of *Gurulingappa v Nandappa*(1), I fail to see why the purchaser should have any equitable right when he has been dealing in a speculation, for he knows that his right to partition is *prima facie* dependent on the life of the vendor. He is just in the same position as a person buying a Hindu widow's life estate. It has never been held that such a person had an equity lasting beyond the widow's lifetime It seems to me that the one, like the other, has purchased a risk and is entitled to no relief, if his venture fails owing to the death of his vendor

The other conclusion of the learned Judges of the Bombay High Court with which I cannot agree is that "as the purchaser does not by the death of his vendor lose his right to the partition, so his position is not improved by the death of the other co-parceners before the partition" It follows from what has preceded that if a purchaser has run the risk of a diminution in the property he is equitably entitled to the benefit of an increase Lastly, even if a suit for partition by the purchaser after the death of a co-parcener were allowable, it would be impracticable to give a proper decree in the case. If, as ruled in the Full Bench decision in *Rengasami v. Krishnayyan*(2), the date of the suit is to be taken as the date on which the details of the partition must be worked out,

(1) I.L.R., 21 Bom., 797.

(2) I.L.R., 14 Mad., 408.

any suit brought, as this suit is, for partition of the family property as it stood on the date of the transfer would be bad in law. If according to that decision the date of the suit is to be taken for effecting a partition, it must be on the fiction, as is suggested in the *obiter dictum* there, that the vendor is still alive. But such a fiction is one-sided and unfair because if the seller were deemed to be alive why should it not also be deemed that while he lived he had begotten more sons, making his own share less, or that some of his co-parceners had been got rid of by him, making his own share greater.

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As there is, in my opinion, no express authority in this Presidency that such a suit as that now in question is maintainable, I would allow the appeal and, reversing the District Judge's order, restore the decree of the District Munsif with costs here and in the lower Appellate Court. Otherwise I would refer the point for the decision of a Full Bench.

BENSON, J.—I think that the order of remand is right, as the plaintiff has an interest which he is entitled to work out by partition in accordance with the law as laid down in *Venkatarama v. Meera Labai*(1), *Alamelu v. Rengasami*(2) and *Rengasami v. Krishnayyan*(3). See also the unreported decisions in *Srinivasaswengar v. Gurumurthy Asary*(4), *Muthuramien v. Subbaramanya*(5) and *Valluri Venkatasami v. Garla Ademma*(6) *

(1) I.L.R., 13 Mad, 275 (2) I.L.R., 7 Mad, 588 (3) I.L.R., 14 Mad, 408

(4) *Second Appeal No. 49 of 1888*—The judgment was delivered, on 1st November 1888, by Sir ARTHUR COLLINS, C.J., and PARKER, J., as follows—“The Judge has overlooked the fact that the debt was not a simple debt, but was secured by an hypothecation bond by V. ceraman in his lifetime. It passed therefore to the survivors of his family burdened by the charge. Whatever may be the law in other parts of India, there is no doubt that this is settled law in the Madras Presidency. The decree of the lower Appellate Court must be reversed and that of the District Munsif restored. The appellants are entitled to their costs in this and in the lower Appellate Court.”

(5) *Appeal No. 166 of 1891*—The judgment was delivered, on 23rd December 1892, by Sir ARTHUR COLLINS, C.J., and HANDIFY, J., as follows—“The District Judge has dismissed the suit on the ground that the hypothecation bonds sued on created no right which could be enforced against the share of Pattavier, the maker of the bonds, after his death. We cannot agree with this view of the law. It is clear law in the Madras Presidency that a sale or mortgage for value by a Hindu co-parcener of his share in the family property will be enforced after his death against his surviving co-parceners. It is sought to make a distinction in the case of a hypothecation which, it is said, transfers no interest in land but merely creates a charge. We see no reason for such a distinction. The principles of equity which have led the Madras Courts to enforce alienations for value of

* *Vide* page 698 for footnote of this reference.

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As to what is the share to which the plaintiff may be entitled, reference may be made to the views of the Bombay High Court in the case reported in *Gurulingappa v. Nandappa*(1) and also to section 44, Transfer of Property Act.

As, however, the question as to whether the suit is maintainable is one of some doubt and is of great general importance, I agree to refer to the Full Bench the following question :—

Whether on the facts stated by the District Judge the plaintiff's suit is maintainable, and, if so, to what remedy is he entitled.

The case came in due course before the Full Bench, constituted as above.

C. V. Anantakrishna Ayyar for appellants—The plaintiff is not entitled to recover anything. What was sold was merely the right to effect partition. *Hardi Naram Sahu v. Rudei Perkush Misser*(2). That was all that the vendee got from his vendor. That

the share of an undivided co-parcener against the family property after his death apply equally to a charge created by him. This was held in Second Appeal No 49 of 1888 to be the law and we shall follow that decision. It is argued for respondent that the District Judge was wrong in holding that Pattavier had, at the date of the hypothecation bonds, any alienable interest in the family property and that the suit should have been dismissed on the ground that he had not. Assuming for the sake of the argument that it is law that, when there are two or more branches of an undivided family, the junior members of any one branch cannot enforce partition of the family property without the consent of the head of the branch, which we are not prepared to decide, we think the Judge is right in holding that, when the right to partition arises, as in this case admittedly it did, subsequently to the execution of the bonds, the Court will enforce a partition in favour of the alienee. This also follows from the principles of equity which have been held in this Presidency to govern transactions between an undivided co-parcener and his alienees for value. The decree of the lower Court must be reversed and the suit remanded for disposal on the merits. Costs to abide and follow the result."

(6) *Second Appeal* No. 730 of 1896.—The judgment in this case was delivered, on 21st July 1897, by SUBRAHMANIA AYYAR and BENSON, JJ, as follows.—"The suit was for partition of the undivided one-sixth share of the first defendant's late husband in the family property, which one-sixth share had been sold to the plaintiff. The District Munsif decreed the claim, but the District Judge reversed the decree on the ground that the plaintiff had failed to show that his vendor had become divided from the family before the sale. It is, however, quite settled law in this Presidency that an undivided member may sell his undivided share and that the vendee may then sue for the partition and delivery of the share due to him. The District Munsif's decree was therefore right. We reverse the decree of the District Judge with costs in this and in the lower Appellate Court and restore the decree of the District Munsif."

(1) I.L.R., 21 Bom., 797.

(2) I.L.R., 10 Cal., 628 at p. 536.

right ceased with the death of the vendor; and the vendee cannot be in a better position than his vendor. The remarks of the Judges, who referred the case of *Rengasami v. Krishnayyan*(1), support the contention that if the vendor dies, nothing passes to his vendee. The principle laid down by the Full Bench in the same case also supports it, namely, that the share should be computed as that which subsisted at the date of the suit, and not at the date of the transfer. If that principle be followed now, the plaintiff here will get nothing. The law as it at present exists regarding the effect of an alienation by a co-parcener of his share in joint family property is not based on the ancient Hindu texts, but on judicial decisions (*Suraj Bunsikoer v. Sheo Persad Singh*(2)), and the rules now laid down should not be extended (*Lakshman Dada Naik v. Ramchandra Dada Naik*(3)). A purchaser, who purchases such an interest, purchases a thing which is uncertain and fluctuating in its nature, and the transaction is a speculative one, and the equitable considerations which led the Courts to recognise such alienations in some cases do not apply. There is a distinction between a voluntary and an involuntary alienation. *Deendyal's Case*(4) and *Balgobind Das v. Narain Lal*(5). The fact that an execution purchaser may be entitled to realise the share of his vendor if the vendor dies and if the execution proceedings have advanced sufficiently far, is not conclusive of the present case, which is one of voluntary alienation. In the Privy Council case (*Madho Pershad v. Mehrban Singh*(6)), it is remarked that the assignee gets nothing on the death of the assignor in the case of a voluntary sale, unless the Hindu law of survivorship is repealed. The conclusions arrived at in the judgments in *Gurulingappa v. Nandappa*(7) do not appear to be consistent. The present question has not been discussed in the Madras cases. One of several co-parceners cannot alienate a specific portion of the joint family property, and on that ground also the plaintiff's purchase is fruitless. Unless the principle laid down in *Rengasami v. Krishnayyan*(1) is departed from, it would seem to follow that the plaintiff here is not entitled to succeed.

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(1) I.L.R., 14 Mad., 408 at p. 410.

(3) I.L.R., 5 Bom., 48.

(5) I.L.R., 15 All., 348

(7) I.L.R., 21 Bom., 797.

(2) I.L.R. 5 Calc., 148 at p. 166.

(4) I.L.R., 3 Calc., 198 at p. 206.

(6) I.L.R., 18 Calc., 157 at p. 163.

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S. Srinivasa Ayyangar for respondent —The question has really been settled. The authorities are all one way, and in favour of the position that the alienee from a co-parcener of his share in the joint family property is entitled to bring a suit for partition even after the alienor's death. There is no decision *contrâ*. According to some decisions, originally, no co-parcener could alienate. It is extremely doubtful if the texts prohibit a co-parcener from alienating his own share. Mitakshara, chapter I, verse 1, page 30, says, one unseparated sapinda has no power over the whole to make a gift, sale or mortgage. According to one opinion of Mr. Colebrooke and the earlier Madras decisions, the Mitakshara does not prohibit a co-parcener alienating his own share. Later authorities, no doubt, inclined to the view that the power to alienate is founded upon an equity in favour of a purchaser for value. Whatever the true Hindu law may have been, it is now settled that, (1) in provinces other than Bombay and Madras, a co-parcener cannot sell, mortgage, or give; (2) in Madras and Bombay, he can sell, mortgage or otherwise alienate for value; (his power to make a gift has been denied); (3) in all the provinces, the undivided interest can be attached and sold in execution. *Deendyal's Case*(1) decided that when the execution-sale was in the lifetime of the judgment-debtor, survivorship cannot defeat it. The next step was taken by the Privy Council in *Suraj Bunsikoer's Case*(2). Attachment during the debtor's life was held to defeat survivorship, even if the sale was held after death. These two cases lay down a principle equally applicable to voluntary sales, in provinces where the latter are allowed. A co-parcener's undivided interest is specific, existing and definite (*Tuffuzool Hoosein Khan v. Rughoonath Pershad*(3)). It is an existing and a vested interest (Mitakshara, chapter I, verse 1, page 4). The alienation divests the interest transferred from the co-parcener and vests it in the alienee. The transferor's subsequent death cannot divest what has already vested. This was clearly laid down by the Full Bench in *Rengasami v. Krishnayyan*(4). The actual decision in that case is erroneous and is opposed to the decisions of the Privy Council in *Deendyal's Case*(5), *Suraj Bunsikoer's Case*(6) and *Hardi Naram's Case*(7). Logically, the time of

(1) I.L.R., 3 Calc., 198.

(3) 14 M. I. A. at p. 50.

(5) I.L.R., 3 Calc., 198.

(7) I.L.R., 10 Calc., 626.

(2) I.L.R., 5 Calc., 148.

(4) I.L.R., 14 Mad. 408 at p. 419.

(6) I.L.R., 5 Calc., 148.

ascertainment ought to be the date of decree, not the date of suit. The Full Bench overlooked the principle laid down by the Privy Council that alienation operates as a severance (*Madho Pershad v. Mehrban Smgh*(1), *Jogeswar Narain Deo v. Ramchandra Dutt*(2)); and the alienee becomes as it were, a tenant-in-common, (*Kallappa Bin Girmallapa v. Venkatesh Vmayah*(3)). Even if *Rengasami v. Krishnayyan*(4) is right, the Court expressly ruled the present point as I contend. It would also logically flow from it. The principle of *Rengasami v. Krishnayyan*(4) is that the alienee steps into the alienor's shoes and is subjected to similar fluctuations of share. Accordingly, the alienee, who is alive, stands in the alienor's shoes as if the legal persona of the alienor were continued in him. The alienor's death does not, therefore, affect the alienee, who is alive and represents the alienor in the partition. Again, survivorship is only a title to property not already validly disposed of. But the law of Madras, allowing a co-parcener to transfer his share by private sale, does not recognise survivorship to that extent, though the family gets the price and there is survivorship as regards it (*Krishnasami Ayyangar v. Rajagopala Ayyangar*(5)). The power to make a private alienation, carries with it the necessary incident that the alienation can be enforced after death and that there is no survivorship, is expressly pointed out by the Privy Council in *Suraj Bunsikoer's Case*(6); where, referring to the distinction between a specific charge on land operating even after death and a mere personal decree not so operating, their Lordships said, "the existence of such a distinction would be the logical consequence of the power of a co-parcener, as recognised in Madras and Bombay, to sell or mortgage joint-property to the extent of his undivided share." That is conclusive. In *Deendyal's Case*(7), the Privy Council said the right of the execution purchaser was the right "of compelling the partition, which his debtor might have compelled, had he been so minded, before the alienation of his share took place." This shows that alienation vests an interest which is to be worked out by a partition, treating it as made before the alienation. In *Suraj Bunsikoer's Case*(8), the

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(1) I.L.R., 18 Calc., 157

(2) I.L.R., 23 Calc., 670.

(3) I.L.R., 2 Bom., 676, 11 B.H.C.R. at p. 81; 12 B.H.C.R., 138.

(4) I.L.R., 14 Mad., 408.

(5) I.L.R., 18 Mad., 73.

(6) I.L.R., 5 Calc., 148 at p. 188.

(7) I.L.R., 3 Calc., 198 at p. 209.

(8) I.L.R., 5 Calc., 148 at pp 173-174.

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Privy Council observed, that if the law of Bengal were similar to that of Madras, the mortgage executed by Adit Sahai would operate after his death as a valid charge upon the Mouza to the extent of his own *then* share. This, again, is conclusive on the point. *Hardi Naram's Case*(1) also decides the point in my favour. The High Court at page 631 and the Privy Council at page 636, held that the interest which is conveyed by the alienation is the right the co-parcener would have to a partition *at the time of the alienation*. The Privy Council expressly stated that the matter ought to be treated as if a sale was to operate as a partition at that time. All these three cases in the Privy Council, as also section 41 of the Transfer of Property Act, are opposed to *Rengasami v. Krishnayyan*(2). The case of *Mudho Pershad v. Mehrban Singh*(3) is wholly inapplicable. That was a case of private alienation under the Mitakshara law of the northern provinces which does not recognise it. Lord Watson, at page 160, expressly referred to this and stated that the sales were, under the law of Bengal, invalid. In that view, any equity as to the refund of the price is a purely personal equity against the deceased co-parcener, a mere personal claim which, like a money-decree, cannot be enforced after his death. The cases of *Alamelu v. Rengasami*(4) and the unreported cases (Second Appeal No 49 of 1888 and Second Appeal No 730 of 1896(5)—*Rangayana Shrinivasappa v. Ganapabhatta*(6) and *Gurlingappa v. Nandappa*(7), are all in favour of the position that there can be no survivorship where an alienation, whether it be a mortgage or a sale, has been made.

Sir ARNOLD WHITE, C.J.—In the case of *Rengasami v. Krishnayyan*(2) the point which was before the Full Bench for consideration was whether, where the purchaser from a member of an undivided family of his share of the family property sues for partition, the share to be awarded to the plaintiff is to be computed with reference to the state of the joint family at the date of the purchase or at the date of the suit. The Full Bench held that the share was to be computed with reference to the state of the family at the date of the suit. In the course of the judgment the question now before us was considered. In discussing

(1) I.L.R., 10 Cal., 626

(2) I.L.R., 14 Mad., 408.

(3) I.L.R., 18 Cal., 157.

(4) I.L.R., 7 Mad., 588

(5) *Vide* pp. 697 and 698 *supra*

(6) I.L.R., 15 Bom., 673; I.L.R., 21 Bom., 797.

(7) 11 B.H.C.R., 72.

the contention which had been put forward (though the question did not arise on the facts of the case then before the Court) that if the vendor died before the purchaser effected a partition, the purchaser would take nothing, the Judges point out that the purchaser acquires a vested interest by the sale and that the vendor being competent to sell, his subsequent death is an event which cannot divest the interest which has once vested. Although these observations are merely *obiter* they seem to me to lay down the rule of law which, under the Mitakshara law as administered in this Presidency, is applicable to the facts of the present case. The same rule is laid down in an earlier Madras case (*Alamelu v. Rengusami*(1)) where Sir Charles Turner puts it thus:—"If a purchaser for value purchases the interest of an undivided co-parcener who dies before partition is effected, the contract nevertheless takes effect and the purchaser may apply for partition."

As regards the point now under consideration the same rule of law has been applied in Bombay. In the judgment in the case of *Gurulingappa v. Nandappa*(2) the following proposition is laid down (page 806):—"As the purchaser does not by the death of his vendor lose his right to partition so his position is not improved by the death of other co-parceners before partition." It is now well settled that under the Mitakshara law as it is administered in Madras and Bombay one co-parcener may dispose of ancestral undivided estate by private contract to the extent of his own share. Under the Mitakshara law as administered in Bengal the law which prevails in the other Presidencies as regards alienation by private deed has not been adopted. See the judgment of the Privy Council in the case of *Suraj Bunsikoer v. Sheo Persad*(3). In the Privy Council case of *Madho Pershad v. Mehrban Singh*(4), the appeal was from Oudh where the law as administered in Bengal prevails and the decision is based on the Mitakshara law as administered in Bengal. The authorities cited and discussed are Bengal cases, and I think the decision only applies and was only intended to apply to a case governed by the Mitakshara law as it prevails in Bengal. The question of the soundness of the decision in the case of *Rengasani v. Krishnanyyan*(5) on the point which was

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(1) I.L.R., 7 Mad, 588 at p 590.

(2) I.L.R., 21 Bom, 797.

(3) I.L.R., 5 Calc, 148 at pp. 166, 167. (4) I.L.R., 18 Calc, 157.

(5) I.L.R., 14 Mad., 408.

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then actually before the Court, viz, whether the time with reference to which the share is to be ascertained is the date of purchase or the date of suit, was discussed at some length in the course of the argument of the present case. In the present case the result would be the same whether the time is taken to be the date of purchase or the date of suit. The point therefore does not arise and I do not think that a determination of the question is necessary for the decision of the question which has been referred to us. In these circumstances I do not propose to discuss it. So far as this High Court is concerned there is express authority that a suit, such as the present, is maintainable, and the decisions of the Privy Council do not appear to me to be in conflict with the Madras decisions to which I have referred.

I am of opinion that our answer to the reference should be that the suit is maintainable. As regards the remedy to which plaintiff is entitled, I think this is a matter which should be dealt with at the trial of the suit under the order of remand, which I think was rightly made.

MOORF, J —I concur.

BHASHYAM AYYANGAR, J —The main question referred to the Full Bench in this case, *i.e.*, whether a suit by a purchaser from a member of an undivided Hindu family, of his undivided half share in two specific plots of land forming part of the joint family property of the vendor and his two undivided nephews, is maintainable after the death of the vendor, against the surviving nephews, to enforce the sale, is, in my opinion, practically concluded in the affirmative by the authority of the Judicial Committee of the Privy Council in appeals from the High Court of Calcutta in cases governed by the Mitakshara law.

Before referring to these, it is necessary to advert briefly to the difference between the Mitakshara law bearing on the question under consideration, as administered in the provinces of Madras and Bombay on the one hand and the same as administered in Bengal and the North-West Provinces on the other. Both here and in Bombay, according to a long course of decisions, an alienation by sale, mortgage or otherwise, by an undivided member, of his interest in the whole or any portion of the joint family property in favour of a purchaser for value is perfectly valid as between the transferor and the transferee; and an involuntary sale in execution of a decree stands on the same footing.

In Bengal and the North-West Provinces, a purchaser from an undivided member, though he be a purchaser for value, acquires no valid title as against the alienor or the undivided family of which he is a member ; and until some time back, even an involuntary sale in execution of a decree was equally invalid. But the Judicial Committee of the Privy Council, in *Deendayal v Jugdeeb Narain*(1) held that so far at any rate as involuntary sales were concerned the law in Bengal must be assimilated to the law in Madras and Bombay, and that decision has been followed in several cases both by the Judicial Committee and the High Courts of Calcutta and the North-West Provinces. In *Deendayal*'s case the undivided family consisted of a father and a son, and a decree was obtained against the father only, on a mortgage bond executed by him, and in execution of that decree, the right, title and interest of the judgment-debtor in certain other family property not covered by the bond was sold and purchased by the decree-holder himself who took exclusive possession of the property. The son brought a suit against the purchaser and the father to recover for the family the whole of the property sold including the father's share, and the High Court of Calcutta decreed the claim in its entirety(2) holding the sale to be void. In appeal, the Judicial Committee came to the conclusion that the law in respect of a purchaser at an execution sale should be declared to be the same in Bengal as that which exists in Madras and held that 'the right of the purchaser at the execution sale' should 'be limited to that of compelling the partition which his father might have compelled, had he been so minded, *before the alienation of his share took place*' (the italics are mine) and accordingly varied the decree of the High Court by "adding a declaration that the appellant as purchaser at the execution sale has acquired the share and interest of the father in that property and is entitled to take such proceedings as he shall be advised, to have that share and interest ascertained by partition." In this case, no doubt, the father was alive both when the execution of the decree against him was completed by sale and also when decree was passed in the suit subsequently brought by the son under which latter decree the purchaser was to be wholly dispossessed, without prejudice to his right to enforce the sale by a partition suit for ascertaining and separating the father's share.

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(1) (1877) L.B., 4 I.A., 247, (S.C.) I.L.R., 3 Cal., 193. (2) 12 B.L.R., 100.

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and interest in the property sold. In the judgment their Lordships expressly state that the right of the purchaser is to compel the partition which his debtor, the father might have compelled had he chosen to do so immediately before the execution sale, but that they refrain from making a precise declaration as to his share since if a partition takes place not only his son, but his wife also may be entitled to a share under the Mitakshara law as administered in Bengal. It may be said that the Judicial Committee in varying the decree of the High Court of Calcutta by adding the declaration above referred to did not contemplate a suit being brought by a purchaser, for partition, subsequent to the death of the vendor (the father) and that the decision of the Privy Council in this case cannot, therefore, be regarded as an authority that such a suit could be maintained after the alienor's death. Be that as it may, there is in this case a clear pronouncement by the Judicial Committee, that for the purpose of ascertaining the interest and share of the undivided member which has passed to the purchaser, you are to see what it would be if a suit for partition had been brought by the alienor immediately before the sale and not what it would be at the date when the purchaser brings his suit to enforce the sale.

The decision of the Privy Council in *Suraj Bunsikoer v. Sheo Persad*(1) passed (in 1879) two years after the above is a direct authority that a purchaser in execution of a decree against the father alone can work out his right as purchaser by a suit for partition brought after the death of the father. In that case, a suit had been brought against the father only, upon a mortgage bond executed by him, and a decree had been obtained thereon in execution of which the property mortgaged was sold and purchased by a stranger. Before, however, he was put into possession of the property, a suit was brought on behalf of the minor sons of the mortgagor by their mother and guardian against the purchaser and the execution creditor, for the adjudication of their rights and confirmation of their possession and the setting aside of the auction sale and for an injunction to restrain delivery of possession of the property sold to the purchaser. It was found that by reason of the nature of the debt neither the sons nor their interests in the property sold were liable to satisfy the father's debts and as the

(1) L.R., 6 I.A., 88; (S C) I.L.R., 5 Cal., 148.

mortgage was not made by the father for a family purpose, it was as a mortgage invalid under the Mitakshara law as administered in Bengal, even in regard to the father's share. The High Court of Calcutta, however, dismissed the sons' suit as the purchaser was a stranger who had no notice of the nature of the debt. Before the Privy Council, the extreme contention on behalf of the infant sons was that nothing passed or could pass to the respondent under the execution sale because, on the death of the judgment-debtor before the sale, the whole of his interest vested by survivorship in his sons, leaving nothing upon which the execution could operate. The extreme contention on behalf of the respondent was that the sale took effect on the whole of the mortgaged property, and passed the interests of the sons as well as of the father therein. An intermediate proposition, which was upheld by the Privy Council, was that the sale was operative upon the right, title and interest of the judgment-debtor in the property put up for sale, so as to pass the share which upon a partition effected in his lifetime, the father would have been entitled to, in the property sold. Adverting to these contentions their Lordships observed as follows(1):—"It seems to be clear upon the authorities that if the debt had been a mere bond debt, not binding on the sons by virtue of their liability to pay their father's debts and no sufficient proceedings had been taken to enforce it in the father's lifetime, his interest in the property would have survived on his death to his sons, so that it could not afterwards be reached by the creditor in their hands. On the other hand, if the law of the Presidency of Fort William were identical with that of Madras, the mortgage executed by Adit Sahai (the father) in his lifetime, as a security for the debt, might operate, *after his death, as a valid charge upon Bissumberpore to the extent of this one-third share* [the italics are mine]. The difficulty is that so far as the decisions have yet gone, the law as understood in Bengal does not recognize the validity of such an alienation. . . . They (their Lordships) think that at the time of Adit Sahai's death, the execution proceedings under which the Mouzah had been attached and ordered to be sold had gone so far as to constitute in favour of the judgment-creditor a valid charge upon the land to the extent of Adit Sahai's undivided share and interest therein which could not be defeated by his

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(1) I.L.R., 5 Calo, 148 at pp 173-274.

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death before the actual sale. If this be so, the effect of the execution sale was to transfer to the respondent, the undivided share in eight annas of Mouzah Bissumberpore, which had formerly belonged to Adit Sahai in his lifetime and their Lordships are of opinion that, notwithstanding his death, the respondents are entitled to work out the rights which they have thus acquired by means of a partition."

In the above extract from the judgment of the Privy Council there is an express pronouncement by the Judicial Committee that if the mortgage bond in question in this case were given by an undivided Hindu father having two sons, governed by the law of Mitakshara as administered in Madras, it would have operated after his death as a valid charge to the extent of his own one-third share as against his two sons, though the mortgage debt was not such as would bind the sons. In other words, though no suit be brought during the lifetime of the father to enforce the mortgage made by him, yet the sons' right by survivorship on the death of the father does not prevail in respect to the father's share in the mortgaged property and the mortgagee may, in a suit brought against the sons, after the death of the father, enforce it to the extent of the father's one-third share. Though, under the Mitakshara law as administered in Bengal, a voluntary alienation made by the father does not prevail, as in Madras, even to the extent of the alienor's share, yet an attachment made or an order for sale obtained, in his lifetime, is recognized by the Privy Council as sufficient to transfer the alienor's share and interest in favour of the purchaser, though the actual sale takes place subsequent to the death of the father. A purchaser of the interest of an undivided member under an involuntary sale has to work out his rights under the sale by a suit for partition in the same way as a purchaser under a voluntary sale. If, in the former case, notwithstanding the death of the judgment-debtor before the sale and therefore necessarily before a partition suit by the purchaser, the right of survivorship is no impediment to the purchaser working out his right by partition after the death of the judgment-debtor, it necessarily follows that the death of a voluntary vendor could be no impediment to the purchaser enforcing the sale in respect of the vendor's share as against the surviving members. If a mortgage bond executed by an undivided member can be enforced by the mortgagee after the death

of the mortgagor against the surviving members of the family, as expressly declared by the Privy Council in the above case, with reference to the law of Mitakshara in Madras, a purchaser by sale from such undivided member cannot be in a different and worse position

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The next case before the Privy Council which has an important bearing upon the question under consideration is that of *Hardi Naram Sahu v. Ruder Perhash Misser*(1) decided in 1883. In that case a creditor obtained a decree for money against the father only and in execution attached, caused to be put up for sale and himself bought the right, title and interest of the judgment debtor in certain property which belonged to him and to his minor son jointly, and obtained possession. Shortly afterwards, the judgment-debtor made a gift of his interest in the family property in favour of his minor son. A suit was thereupon brought on behalf of the minor son to recover the whole of the property purchased by the decree-holder. During the pendency of the suit another son was born to the judgment-debtor and it was contended before the High Court that a share should be allotted to such son also. The High Court, however, following the decision of the Privy Council in *Suraj Bansi Koer v. Sheo Persad*(2), overruled this contention and held that the property which passed to the defendant—the purchaser—was the share and interest of the father which would have been allotted to him if a partition of the family property had taken place just before the execution sale and that as the family at that time consisted only of the father, his wife and one son, the father was entitled to one-third share and that such one-third share ought to be allotted to the defendant—the purchaser—and the other two-thirds, to the minor plaintiff and his mother. The case was carried in appeal to the Privy Council by the defendant—the purchaser—principally on the ground that the sale should be upheld in its entirety as it was not shown that the decree debt was contracted by the father for any illegal or immoral purpose. The judicial Committee affirmed the decision of the High Court, holding that the purchaser became entitled only to one-third which would have been the share that would have been allotted to the father if a partition had taken place at the time of the sale.

(1) I.L.R., 10 Cal., 626.

(2) I.L.R., 5 Cal., 148, 166.

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Pending the appeal to the Privy Council the mother died, but the decision of the Privy Council proceeds on the footing that neither the birth of the second son after the date of the execution sale, nor the subsequent death of the mother before a partition was effected, affected the share to which the purchaser became entitled at the date of the execution sale. In connection with this case it may also be observed that, in the opinion of their Lordships of the Privy Council, the proper decree to be passed in a suit against a purchaser from a member of an undivided Hindu family, is, as in Deendayal's case, for recovery of possession of the whole property with a declaration that the defendant—the purchaser—had acquired the share and interest of the judgment-debtor in such property and was entitled to take proceedings to have it ascertained by partition.

The learned pleader for the appellant strongly relies upon the decision of the Privy Council in *Madho Pershad v. Mehrban Singh* (1) [passed in 1890] as an authority that the undivided share on the death of the vendor passes by survivorship, if the purchaser had not, during the lifetime of the vendor, taken steps to effect a partition of such share. That case was an appeal from Oudh and it was there “conceded in argument that the rules of the Mitakshara law which prevail in the Courts of Bengal are applicable in Oudh to the alienation of interests in a joint family estate.” It was accordingly held that a sale made by one of two undivided members of a joint Hindu family without any legal necessity or the consent of the other member was void, both during the lifetime of the vendor and after his death and that therefore his undivided share passed by survivorship to the surviving member, according to the ruling of the Full Bench of the Calcutta High Court in *Sadabant Prasad v. Foolbash Koer* (2), in which it was held that where family property is mortgaged by an undivided member, for a purpose not binding on the family, such mortgage will not, under the Mitakshara law as administered in Bengal, affect the property mortgaged, or the mortgagor's share and interest therein, and that on his death, therefore, the property passes to the surviving members unaffected by the mortgage and can be recovered by them without redeeming the mortgage. The main

(1) L.R., 17 I.A., 194, (S.C.) I.L.R., 18 Calc., 157.

(2) 3 B.L.R.F.B., 31.

contention before the Privy Council on behalf of the purchaser—appellant—based on the authority of *Mahabeer Prasad v. Ramyad Singh*(1) was that the price paid by the appellant ought to be declared a charge on the interest and share of the deceased vendor. In overruling this contention, Lord Watson, delivering the judgment of the Judicial Committee, observed as follows :—

“ Their Lordships are unable to see that any analogy exists between that case and the present. It is unnecessary to decide whether if Zalim Singh (the vendor) had been still alive, and so entitled to resume his undivided share on cancellation of the sale-deeds, it would have been possible to order partition and to charge Zalim's divided share with the Rs. 10,000 paid to him by the appellant. That course is rendered impossible by his death. It might have been quite consistent with equitable principles to refuse Zalim restitution of the interest which he sold except on condition of its being made at once available for repayment of the price which he received. But the respondent is not affected by any equity of that kind. He took in his own right by survivorship and is not liable for the personal debts and obligations of his uncle Zalim; and it appears to their Lordships that an equity which might have been enforced against Zalim's interest whilst it existed cannot be made to affect that interest when it has passed to a surviving co-parcener, except by repealing the rule of the Mitakshara law.”

In this very case Lord Watson points out that if there has been an attachment of a member's undivided share during his lifetime in execution of a decree against him at the instance of a creditor, that will be sufficient to support the alienation of a member's interest in the estate or a sale under the execution and to defeat the rights of survivorship of the remaining members in respect of such interest or share.

The principle affirmed by this decision, viz., that, on the death of an undivided member, a debt due by him personally cannot be charged against his interest and share in the joint family property or realised by attachment and sale thereof, is equally applicable in this presidency. Thus, a simple creditor of a member of an undivided family, even if he has obtained a decree against him which, however, has not been enforced in his lifetime by attachment

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(1) 12 B.L.R., 90.

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of his interest in the family property cannot, after his death, seek to enforce the decree against such share and interest. In Bengal and the North-Western Provinces, a mortgage or sale made by an undivided member without legal necessity or the consent of the remaining members, being altogether invalid as a mortgage or sale, the mortgagee or vendee is only in the position of a simple creditor as against the undivided member and the position of a simple creditor of an undivided member is the same under the Mitakshara law as administered in all the provinces.

I shall now proceed to consider a few of the decisions of this Court bearing upon the question,—chief among them, the Full Bench decision of this Court in *Rengasami v. Krishnayyan*(1). The learned Judges, who made the reference to the Full Bench in that case, stated their opinion as follows, in the order of reference:—

“He (the vendor) cannot put his alienee in a better position than himself and thereby prejudice his co-parceners, and the alienee, therefore, must be liable, until he obtains partition, to the same fluctuations in the amount and value of the share caused by changes in the number and circumstances of the family as his alienor would have been liable to if the alienation had not taken place. It was pressed upon us in argument that, if this be so, the purchaser might, in some cases, take nothing, for his vendor might die before anything was done to enforce the purchase, and also that if the purchaser is to be liable to have what he has purchased diminished by changes in the family, he must also have the benefit if such changes should increase the share of his vendor. It seems to us that both these consequences logically follow from the legal position which the alienee occupies, and we do not see that they involve any absurdity. He who purchases the interest of a member of an undivided family in the family property purchases that which is from its nature uncertain and the purchase must always partake of the nature of a speculative transaction; but he knows perfectly well what he is buying and is not to be pitied if he gets less than he hoped for any more than he is to be blamed if he gets more” (pages 410–411). With all deference to the learned Judges, I am compelled to dissent from their opinion as to the character and incidents of an alienation, made by an undivided member, of his share and interest. The Full Bench adopted

(1) I.L.R., 14 Mad., 408.

the view of the referring Judges only to the extent of holding that if the alienor's share in the family property diminishes after the date of the alienation by the birth of other co-parceners in the family, the share which the alienee will be entitled to get will only be the diminished share which the alienor himself will be entitled to, on the date of the suit which the alienee may institute for the purpose of enforcing the sale by partition of the family property. But in the judgment of the Chief Justice and Muttusami Iyer, J.—which was concurred in by the other two Judges without any qualification—the Full Bench expressly dissents from the view that the purchaser will take nothing if the vendor dies before the purchaser effects a partition, or that he will take a larger share if between the date of the alienation and that of his suit, there is a diminution in the number of co-parceners. The actual decision in this case no doubt was that the purchaser was entitled only to a diminished share, as in that case new co-parceners had been born between the date of the alienation and the date of the suit by the purchaser. But that decision cannot be relied upon as logically leading to the conclusion that the purchaser will take nothing if, as in the present case, the vendor dies before proceedings are taken by the purchaser to enforce the sale by partition—having regard to the fact that the learned Judges expressly guarded themselves against such conclusion. In my opinion the actual decision in the case itself is opposed to the principle on which the above decisions of the Privy Council proceed, none of which is referred to in the judgment except Deendayal's case, and even that for another purpose. But whether that is so or not—a point which it is unnecessary to decide in this case—there is nothing in it to warrant the contention that the share and interest conveyed by an undivided member of a Hindu family will lapse to the family on his death unless the purchaser has, in the meanwhile, enforced the sale by partition. If that should be the result when no suit has been instituted by the purchaser prior to the death of the vendor, the result would be the same even if the vendor be alive at the time of the suit but died before the passing of the final decree therein. It seems to me that the right of survivorship is incompatible with the position that a member of a Hindu family can alienate his undivided share and interest for value—a position which has long been established by judicial decisions both in Madras and in Bombay. To hold that the right of survivorship will prevail

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against the purchaser would be tantamount to assimilating the law in Madras and Bombay, in this respect, to that in Bengal and the North-Western Provinces—whereas the tendency of the Privy Council, if not of the High Courts themselves, has been gradually to assimilate the law in Bengal and the North-Western Provinces to that in Madras and Bombay, the course of decisions in both of which is but the natural development of the principle that under the Mitakshara law every co-parcener can enforce partition at his will and pleasure even as against his father.

In meeting the contention that if the vendor dies before the purchaser effects a partition, the latter will take nothing, the interest conveyed under an alienation made by an undivided member is thus explained in the full Bench decision—

“The answer is that the interests carved out by the sale vest in the purchaser at once and that the vendor being competent to sell, his subsequent death is an event which cannot divest the interest which has once vested and, for the purpose of giving effect to his contract of sale, the purchase must be dealt with as if the seller were alive when the purchaser demands partition.”

I fully concur in this statement of the law save that in place of the concluding words “as if the seller were alive when the purchaser demands partition,” I would substitute “as if a partition of the family property had been made immediately before the sale.” So far as the present case is concerned it is immaterial whether the above statement of the law is thus modified or not—for the only fluctuation in the number of co-parceners in the family between the date of the alienation and the date of the suit has been the death of the alienor himself.

The decisions of this Court in *Alamelu v. Rengasami*(1) and in some unreported cases referred to in the order of reference are directly in point, but it is argued that they carry no weight as the question is not discussed in them, being dealt with “as settled law,” and as no authority is quoted in them, and that up to the date of the ruling in *Alamelu v. Rengasami*(1) there appears to have been no decision of this Court to the same effect.

The question of a member of an undivided Hindu family alienating family property for his own purposes is not a topic dealt with, as far as I am aware, by any texts of Hindu law or by the

(1) I.L.R., 7 Mad., 588.

commentators. No express authority on the subject can therefore be found in the Hindu law books, and it is questionable whether an alienation by a co-parcener of his undivided share and interest was recognised by Hindu jurists. As observed by the Judicial Committee "there can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided Hindu family and the law as established in Madras and Bombay has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes and work out his rights by means of a partition" (*Suraj Bansi Koer v. Sheo Persad*(1)).

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Before discussing the question further, with reference to the growth of the judiciary law, I may point out that before the date of the ruling in *Alamelu v. Rengasami*(2), there was a ruling to the same effect in *Vencatutchella Pillay v. Chinmaya Mudaliar*(3). In that case, the vendor (one Subbaraya Mudali) as one of two co-parceners was entitled to a moiety of the joint family property. He sold one entire village and put the purchaser in possession thereof. After the death of the vendor the surviving co-parcener brought a suit to recover his one-half share in the village. The purchaser resisted the suit on the ground that the entire village formed less than a moiety of the whole family property and that therefore the conveyance would operate to vest in him the whole village. Though the principle was recognized "that each co-parcener has a vested present undivided estate in his share which he may at any time convert into an estate in severalty by a compulsory or voluntary partition, and that such estate was transferable like any other interest in property," yet the contention that the vendee was entitled to the whole village was overruled on the ground that though the extent and value of the village in question was less than the extent and value of a moiety of the entire family property, yet as the vendor was entitled only to one moiety in the village, the conveyance could operate to convey only a moiety of the village. It will here be noted that though the vendor was dead at the time of the suit, yet it was not contended or held that his share lapsed by survivorship to the plaintiff, and the purchase was upheld to the extent of a moiety. This decision, so far as it holds that the

(1) I.L.R., 5 Cal., 148 at p. 166.

(2) I.L.R., 7 Mad., 588.

(3) 5 M.H.C.R., 166.

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purchaser can recover the share of the vendor by a partition only of the specific property sold, has been modified by subsequent decisions (*Venkatarama v. Meera Labai*(1) and *Palani Konan v. Masakonon*(2)), and the law as now settled is that the purchaser can enforce the sale only by a partition of the entire family property and if in such partition the property sold can, with due regard to the interests of the other sharers, to the debts due by the family and to an equitable allocation of the various items of family property to the shares of the several co-parceners, be wholly allotted to the vendor's share, the purchaser will be entitled to the whole property which the vendor professed to convey to him

According to the theory of an undivided Hindu family, each member has a present vested interest, which, by a partition at his will and pleasure, can be converted into a separate interest. The judicial decisions have recognised that such interest is transferable either in whole or in part for value and that the transferee therefore takes a vested present interest. What is transferred to him is thus a present vested interest and not a future contingent interest, uncertain and fluctuating, until the transferee actually effects a partition—even assuming that such a contingent and possible future interest could legally be transferred [*vide* section 6 (a) of the Transfer of Property Act]. The transfer in question operates upon the vested interest which the transferor had in the family property just before the alienation and the same is converted for the benefit of the transferee into the separate share and interest of the transferor by a partition of the family property at the time of such alienation. The estate that is transferred to and vested in the alienee is not an “equitable interest” as understood in the English law, but a ‘legal estate’ which has to be reduced into possession by the alienee standing in the shoes of the transferor and effecting a partition on the footing on which the family and the property both stood at the time of the transfer. No subsequent alienations made for purposes binding upon the family or by the vendor himself can affect the interest that has passed to the prior transferee, nor will such interest be enlarged or diminished by fluctuations in the number of co-parceners in the family. Thus, to take the two extreme cases where a co-parcener has transferred for value his undivided share in the joint family property, the

(1) I.L.R., 13 Mad., 275

(2) I.L.R., 20 Mad., 243.

death of all the other co-parceners before the vendee sues to enforce the sale will not entitle the vendee to recover from his vendor, the sole surviving member, the whole of the joint family property, nor, on the other hand, will the death of the vendor prior to the enforcement of the sale divest the vendee of the interest vested in him by the sale

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The vendee's suit to enforce the sale by partition is not a suit for 'partition,' in the technical sense in which 'partition' or 'vibhaga' is used in the Hindu law. A suit for partition, in the technical sense, can be brought only by an undivided member of the family. The right to such partition is personal to him and not transferable. Such a suit can be brought only in the lifetime of the co-parcener and even if so brought, it will abate if he should die before final decree, without leaving male issue. A partition in the technical sense, whether effected amicably or by decree of Court, breaks up not only the joint ownership of property, but also the family union, *i.e.*, the corporate character of the family. Each member thereafter becomes a divided member with a separate line of heirs to himself. An undivided member of a family, though he may alienate either the whole (*Gurulingappa v. Nandappa*(1)), or any part of his undivided share will continue to be an undivided member of the family with rights of survivorship between himself and the remaining members in respect of all the family property other than what he has transferred. No doubt such a member acts unfairly towards the rest of the family and if they are dissatisfied with his so doing, their only remedy is to become divided from him. When a partition is effected subsequent to such alienation, either amicably or by suit, the property alienated will be included in such partition and debited to the share of the alienor. The transferee, however, does not step into the shoes of the transferor as a member of the family and there will be no community of property between him and all or any of the members of the family in respect either of the property transferred to him or the rest of the family property. The only uncertainty or speculative character of his purchase, which may exist in certain cases, is not as to the extent of the share and interest transferred, but the impossibility of predicting what particular properties would be allocated to his vendor's share if a partition were effected

(1) I.L.R., 21 Bom, 797.

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immediately before the transfer. A co-parcener may profess to alienate either his undivided share in the whole of the family property or his undivided share in some specified portion of the family property—as in the present case—or the whole of a specified portion of the family property—as in the case in *Venkatachella Pillai v. Chinmaya Mudaliar* (1). The same thing may take place in the case of involuntary sales also. In all these cases, the sale operates upon the interest and share of the transferor as the same existed at the date of the transfer and the transferee must work out the transfer by bringing a suit for ascertaining what the share and interest of the transferor was at the date of the transfer. Such a suit is not technically a suit for partition and the decree which he may obtain enforcing the transfer, either in whole or in part, by a partition of the family property will not by itself break up the joint ownership of the members of the family in the remaining property, nor the corporate character of the family. Such being the nature and consequences of a suit to enforce a transfer—in which suit partition of the family property has to be made only incidentally for the purpose of working out the transfer—it is immaterial whether the suit is brought during the lifetime of the alienor or after his death. The cause of action on which the suit is based is the transfer made to the plaintiff of the interest of the transferor at the date of the transfer in the family property to which the transfer relates. When the transfer is of an undivided interest in the whole of the family property, the transferee will get whatever may be allotted to the transferor's share in a suit for partition. But if the transfer relates to any specified portion of the family property, there is the risk that it may turn out that in a partition of the whole property it is impracticable or inequitable to allocate either the whole or a part of such specified portion to the share of the transferor. Whether the transferee brings his suit immediately after the transfer or at any time during or after the lifetime of the transferor, the transfer will have to be enforced by effecting a partition in the same way as it would be if the partition were effected immediately before the transfer. If it be found impracticable or inequitable to allot to the transferor's share the whole or any portion of the specific property transferred, the transfer will become inoperative either in

(1) 5 M.H.C.R., 166.

whole or in part, as the case may be, and in that case the transferee can only have an equitable claim for compensation against the alienor and on the principle laid down by the Judicial Committee in *Madho Pershad v. Mehrban Singh* (1) such claim for compensation cannot, in the case of the alienor's death, be enforced against the surviving members of the family against whom the transferee has no equity and who have taken in their own right by survivorship.

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The claim of a transferee from a co-parcener to work out the transfer is no doubt an equitable claim in the sense that he must be a transferee for value and in cases where the transfer relates to a specific portion of the family property, he has no legal right, any more than his transferor himself, to insist on that specific portion being allotted to the share of the vendor. Being a purchaser for value he will have an equity to have such portion or so much thereof as is practicable so allotted, if that can be done without prejudice to the interests of the other sharers. In any suit which may be brought by him to enforce the sale, all the members of the family should be joined as parties as in a partition suit, the subject-matter of the suit being the family property as it existed at the date of the transfer. Such a suit may, at the option of the members of the family, assume the character of a family partition suit and a decree may be passed for partition, among all the members, of the entire family property.

In the present case, the plaintiff, who seeks to enforce the sale after the death of the vendor against his two surviving undivided nephews, seeks to recover, by partition, one-half of two plots of land measuring 4 acres 52 cents, in which an undivided moiety was sold to him, the plots themselves forming only a portion of the joint family property as it existed at the date of the sale. It being admitted, as I presume, that the vendor was entitled to a half share in the whole of the family property, there can be no doubt that the extent of land claimed is within the limits of the vendor's share and the only question for determination in the case will be whether, having regard to the nature and value of the plots of land in question and the rest of the family property, a moiety of the fields in question could equitably have been included in the vendor's share, if a partition had been effected between the vendor and his nephews at the date of the sale.

(1) I.L.R., 18 Calc., 157.

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As regards the analogy between a person buying a Hindu widow's life-estate and a person buying the interest of an undivided co-parcener it seems to me that such analogy as there is between the two leads to the inference that a person buying from an undivided co-parcener necessarily buys an estate lasting beyond the lifetime of his vendor unless, of course, the family has only a limited interest in the property, and that his death cannot affect the purchaser's interest.

In my judgment in *Sriramulu v. Kristnama*(1) after referring to the nature of a widow's estate under the Hindu law, and her power of alienation for a necessary purpose according to the standard of Hindu law, I stated that "the texts of Hindu law, however, do not deal with a widow's power of alienation of her husband's estate at her will and pleasure for the term of her life or for any shorter period, but she is enjoined by those texts to restrain her personal expenditure within the modest limits which were considered suitable to her bereaved condition. But it has now long been established by judicial decisions that a Hindu widow has an absolute right to the fullest beneficial interest in her husband's property for her life and that she has a personal right therein which she can exercise at her will and pleasure by giving, selling or transferring the estate to another for her own life." Similarly a co-parcener in an undivided Hindu family can, under the texts of Hindu law, deal with the family property for necessary purposes and there is nothing in those texts, as far as I am aware, empowering him to alienate his undivided share and interest at his will and pleasure and for his own purposes. But it has now long been established by judicial decisions that a co-parcener has a personal right in the family property to the extent of his undivided share and interest therein, which right he can dispose of at his will and pleasure in favour of a purchaser for value though not in favour of a volunteer. A Hindu widow, according to judicial decisions, has a personal right in her husband's estate which she can dispose of for her life only whether in favour of purchasers for value or volunteers. Her personal right in her husband's estate is only an estate for life and therefore, even if the purchaser enforces the sale and recovers possession during her lifetime, his right in the property terminates with her life. But a co-parcener's estate

(1) Second Appeal No. 706 of 1900; 12 Mad., L.J., Rep. at p. 200.

and interest to the extent of his share in joint family property is not one for his life only, as in the case of a widow; and if the family estate be an estate in fee simple, the individual estate of each of the co-parceners, which he can dispose of for value, is also one in fee simple and the purchaser therefore acquires an estate in fee simple and not one limited to the lifetime of the vendor—and the death of the vendor, whether before or after the purchaser works out the transfer and reduces the estate into possession, cannot affect his right, title and interest in such estate.

For the foregoing reasons, I would, in answer to the question referred to the Full Bench, say that the plaintiff's suit is maintainable and that he is entitled to recover, by partition, a moiety of the plots of land in question if such moiety could have been equitably allotted to the plaintiff's vendor's share in case a partition of all the family property, between him and his nephews, had been effected immediately before the sale to the plaintiff.

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VENKATA-
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v.
AIYYAGARI
RAMAYYA.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

AMBALATHILAKATH MOIDIN KUTTI (SECOND DEFENDANT),
APPELLANT,

1902.
January 21.

v.

AMBALATHILAKATH KUNHI KUTTI ALI (PLAINTIFF),
RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 283—"Party against whom an order has been made."

Plaintiff sued to recover possession of immoveable property. The land in question had, on a previous occasion, been attached in execution of a decree against plaintiff, whereupon his younger brother, the present second defendant, had preferred a claim-petition, on which an order was passed holding that plaintiff (then judgment-debtor) and second defendant (then claimant) were jointly entitled to the land. The claim was held to be good to the extent of a moiety of the land, which was accordingly released from attachment, the other moiety being

* Second Appeal No. 1017 of 1900 against the decree of E. L. Vaughan, Acting District Judge of North Malabar, in Appeal Suit No. 186 of 1900 presented against the decree of K. Imbichunny Nair, District Munsif of Cannanore, in Original Suit No. 337 of 1899.

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KUTTI ALI.

ordered to be sold, the claimant's claim thereto being rejected. Plaintiff satisfied the decree and the property was not sold. He now sued to recover possession of it:

Held, that, having regard to the terms of the order in the claim proceedings and to the fact that it had not been proved that plaintiff had actually received notice of them, plaintiff was not a party against whom an order had been made, within the meaning of section 238 of the Code of Civil Procedure, and that the order was not conclusive as against him.

Net etom Perengaiyom v. Tayanbany Parameshwaren Nambudi, (1 M.H.C.R., 472), doubted.

SUIT to recover a saw-pit. Plaintiff alleged that he had leased a piece of land to first defendant for a saw-pit to be made on it, that first defendant made the pit, and transferred his claim to second defendant, who paid rent for some time and then leased the property to third defendant, and that the defendants refused to surrender the land to plaintiff when asked to do so, though the term of the lease had expired. First and second defendants contended that the land belonged to plaintiff and second defendant jointly, both being parties to the lease, that first defendant had transferred his right to second defendant, and was consequently under no liability. Second defendant (who was plaintiff's younger brother) further pleaded that by an order passed in a claim-petition (filed as exhibit I), which second defendant had preferred when the property had been attached by the holder of a decree against plaintiff, it had been held that it belonged to plaintiff and second defendant jointly. Third defendant supported second defendant and offered to surrender the portion of the property of which he had possession on receipt of compensation for improvements. Exhibit I was a claim-petition presented by second defendant, as claimant, on the property being attached by Kachayi Amed, a decree-holder for the amount due to him by the present plaintiff, who was then the judgment-debtor. The material parts of the order were as follows:—"The claimant and the judgment-debtor are brothers living apart from each other under the family karar since 1875 The questions here are whether the three pits and the paramba under attachment are the exclusive property of the judgment-debtor or whether they are his tarwad property Seeing that the claimant and judgment-debtor are now members of practically two different tarwads the improvements which they effected in the plaint paramba and the saw-pits must be presumed to belong to them jointly I am therefore

of opinion that the claim is good to the extent of one-half of the paramba and that the other half of it and the three saw-pits are liable to be sold as the property of the judgment-debtor." It was ordered as follows:—"That a moiety of the paramba and trees belonging to the claimant be released from attachment. Claimant's three pits have not been attached. Judgment-debtor's three pits, which are under attachment, will be put up to sale, the claimant's claim thereto being rejected." The District Munsif held that even though the property might be the joint property of plaintiff and second defendant, plaintiff, as senior member of the tarwad, was entitled to recover the saw-pit leased by him. He also held that second defendant held possession as assignee of plaintiff's tenant. He decreed that on plaintiff's paying second defendant compensation for improvements the property should be surrendered to plaintiff by second and third defendants. This was confirmed by the District Judge on appeal.

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KUTTI
v.
KUNHI
KUTTI ALI.

Second defendant preferred this second appeal.

J. L. Rosario for appellant.

C. Sankaran Nayar for respondent.

JUDGMENT.—Having regard to the terms of the order made in the claim proceedings and to the fact that it was not proved that the plaintiff actually received notice of the claim proceedings, we are of opinion that the plaintiff is not a party against whom an order has been made within the meaning of section 283, Code of Civil Procedure, and that the order is not conclusive as against him. We do not think the decision of the Full Bench (*Nettomon Perengaryppom v. Tayanbairry Parameshuaren Numbudri*(1)) precludes us from adopting this view. Moreover it seems doubtful whether, having regard to the observations made in the judgment of the Privy Council in *Sardhari Lal v. Ambika Pershad*(2), this decision is good law. The Bombay and Calcutta High Courts have adopted a different view from that taken by the Full Bench in the case referred to (*Shivappa v. Dod Nagaya*(3) and *Kedar Nath Chatterji v. Rathal Das Chatterji*(4)). See, however, (*Surnamoyi Das v. Ashutosh Goswami*(5)).

The second appeal is dismissed with costs.

(1) 4 M.H.C.R., 472.

(3) I.L.R., 11 Bom., 114.

(5) I.L.R., 27 Cal., 714.

(2) 15 I.A., 123.

(4) I.L.R., 15 Cal., 674.

APPELLATE CIVIL.

*Before Mr. Justice Moore.*1902.
January 23.

ALAGAPPA CHETTI (JUDGMENT-DEBTOR), PETITIONER,

v.

SARATHAMBAL AND OTHERS (CREDITORS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 336, 344—Arrest of judgment-debtor—Petition under s. 366—Release on furnishing security to apply to be declared insolvent within a month—Failure to apply within that time—Subsequent application under s. 344—Maintainability.

A judgment-debtor, who had been arrested, was released under section 366 of the Code of Civil Procedure on furnishing security that he would, within one month, apply to be declared an insolvent. The month passed and he failed to make the application. He was not arrested again, and, at a subsequent date, applied under section 344 to be declared an insolvent.

Held, that he was entitled to do so.

PETITION for a declaration of insolvency under section 344 of the Code of Civil Procedure. A decree had been passed against petitioner in the court of the District Munsif at Madura, and was sent for execution to the court of the District Munsif at Sivaganga. Petitioner was arrested on 22nd January 1899, and on 29th January filed a petition in the court at Sivaganga under section 336, stating his intention to apply to be declared an insolvent and asking that he might be released on security being furnished that such application would be duly made. On 1st February 1899, petitioner was released on security being given that he would apply within a month. On 2nd March 1899, the District Munsif of Sivaganga extended the time until 20th March, on which date petitioner filed his application in insolvency. It appears to have been subsequently ascertained that the insolvency petition ought to have been presented to the Madura Court, and on 6th May 1899 the present petition was there filed. The District Munsif held that it was out of time. On appeal, the District Judge said:—"As I read section 336 of the Code of

* Civil Revision Petition No 92 of 1900 under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of H. Moberley, Acting District Judge of Madura, passed on 22nd January 1900, in Civil Miscellaneous Appeal No. 15 of 1899 against the order of A. Narayanan Nambiyar, District Munsif of Madura, dated 20th October 1899, in Insolvent petition No. 6 of 1899.

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AMBAL.

Civil Procedure, if a judgment-debtor, who has been arrested in execution of a decree and released on furnishing security that he will within one month apply to be declared to be an insolvent, fails to put in his application within the time agreed upon, he is debarred from again claiming the privilege of that section; and his only remedy is to allow himself to be arrested and when he is under arrest or in prison, apply under section 344 of the Code." He dismissed the petition.

Petitioner preferred this Civil Revision petition.

P. S. Sivaswami Aiyar for petitioner.

JUDGMENT.—The order of the District Judge cannot be upheld. The petitioner was arrested on the 22nd January 1899 but was released under section 336, Civil Procedure Code, on his furnishing security that he would within one month apply to be declared an insolvent. For reasons that need not be considered he did not apply to a court having jurisdiction till the 6th May 1899 when he made the present application to the District Munsif of Madura, who rejected it as out of time. On appeal, his order was confirmed by the District Judge. It does not appear that there is any question as to a bar by limitation in a case of this sort. As the petitioner did not put in his application to be declared an insolvent within the prescribed time he was liable to be committed to jail and if this had been done he would certainly have had to put in a fresh application under the third clause of paragraph (b) of the proviso to section 336, Civil Procedure Code. He was not, however, so arrested and it is therefore still open to him to apply under section 344, Civil Procedure Code, to be declared an insolvent on the strength of the permission given to him to do so on the 23rd January 1899.

This appeal is allowed, the order of the District Judge is set aside with costs and the appeal is sent back to him for decision of the other points raised.

APPELLATE CRIMINAL.

*Before Mr. Justice Davies and Mr. Justice Bhashyam Ayyangar.*1902.
January 28.

KING-EMPEROR

v.

C. SRINIVASAN (PETITIONER), ACCUSED.*

Indian Penal Code—Act XLV of 1860, ss. 417, 511, 468—Attempting to cheat and forgery—Application to University for duplicate certificate by person not entitled—Offence.

S. held a Matriculation certificate which had been issued to him by a University. C. had failed to pass the Matriculation Examination. The Registrar of the University received a letter purporting to be signed by S., stating that his certificate had been lost and requesting that a duplicate might be issued. Enclosed with the letter was what purported to be a certificate by the head-master of a local school, corroborating the statement as to the loss and supporting the application for the issue of a duplicate. This document had not, in fact, been written by the head-master, and S. had not in fact lost his Matriculation certificate. C. was charged with cheating and forgery to commit cheating. The Deputy Magistrate found, on the evidence, that the writer of the application for a duplicate certificate was the accused, and convicted and sentenced the accused on both charges. The Sessions Judge, on appeal, altered the offences to those of attempting to cheat and forgery to commit cheating and reduced the sentence. Subject to these modifications he dismissed the appeal. On a revision petition being filed in the High Court:

Held, that the charge of cheating must fail, inasmuch as there was no proof that the deception practised by the accused on the Registrar of the University had caused harm or damage to him or to the University which he represented. Nor was it shown that the accused, in applying for the duplicate certificate, had any intention of causing wrongful gain to himself or wrongful loss to the University, to whom he had paid a fee greater than the cost price of the certificate. The charge of forgery also failed, for, assuming that accused had fabricated the head-master's certificate it was not shown that he had done so fraudulently or dishonestly and with intent to cause damage or injury to the public or to any one. The question before the court was not as to his intended use of the certificate subsequently. Even if he had such an intention this mere preparation did not amount to an attempt to commit an offence within the meaning of section 511 of the Indian Penal Code.

CHARGES of cheating and forgery to commit cheating under sections 420 and 468, Indian Penal Code. In 1900, one S.

* Criminal Revision Petition No. 438 of 1901 under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of R. D. Broadfoot, Sessions Judge of South Arcot, in Criminal Appeal No. 75 of 1901 presented against the finding and sentence of M. Azizuddin, Deputy Magistrate of Cuddalore, in Calendar Case No. 74 of 1901.

Srinivasan went up for the Matriculation Examination held by the University of Madras, and passed. Accused, whose name was C. Srinivasan, went up for the same examination and failed. Subsequently the Registrar received the following letter:—

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EMPEROR
".
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VASAN.

"MAYAVARAM, 27—2—1901.

TO THE REGISTRAR OF THE UNIVERSITY OF MADRAS. Most Respected Sir, I was a candidate for the Matriculation Examination held in December 1899 and I passed in it and I was placed in the first class (Supplement to *Fort St. George Gazette*, April 3, 1900, first class, 24th rank, 1st page in the list of passed candidates. Register No. 3140). On 2nd February when my house was plundered by thieves I lost my Matriculation certificate together with certain records (bonds) worth Rs. 500. Therefore, I am now in want of a certificate. Hitherto I have produced a certificate (identification) from the head of the institution where I received my instruction. I am a poor boy and I have to enter into some department. Therefore I humbly beg of you to be kind enough to send my certificate. I beg to remain, Sir, Yours obediently,

S. STREENIVASAN,

c/of Krishna Reddi, Near Sayorgate,
Napier's Road, Kanganakuppam
(via.) Cuddalore."

This letter enclosed the following certificate:—

"MAYAVARAM, 27—2—1901.

MUNICIPAL HIGH SCHOOL, MAYAVARAM. This is to certify that S. Sreenivasan was a student of this institution and passed the Matriculation Examination held in December 1899 in the first class. I hear from his guardian that, when his house was plundered on the 2nd February, he lost his Matriculation certificate with some other records. His conduct is very satisfactory. His request may be granted. S. NARAYANASAMI."

This was filed as B-2.

The person whose signature this certificate purported to bear was the head-master of the school at Mayavaram. The Registrar of the University, in reply to the application, informed the writer that a duplicate certificate would be issued on payment of Rs. 3, that being the fee chargeable. This sum was paid to the local treasury and a receipt for the amount was forwarded to the Registrar, who then issued the duplicate certificate. Instead,

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however, of sending it direct to the applicant, he addressed it to the head-master of the school at Mayavaram, together with the certificate purporting to be signed by that person. It was then discovered that the supposed certificate had not in fact been written or signed by the head-master, and it was also ascertained that S. Sreenivasan, the successful candidate had not, in fact, lost his certificate. This was reported to the Registrar, who then caused a letter to be sent by registered post to the address given by the applicant, and at the same time gave notice to the authorities in that locality, as the result of which, a police constable in plain clothes was sent to watch who should take the registered letter. Accused took it, and was subsequently arrested and charged. For the defence, it was not denied that the supposed certificate was not what it purported to be, or that some one had attempted to obtain a duplicate certificate from the Registrar of the University, but the accused denied that he had done so and endeavoured to show that when the registered letter was offered to him he had said that it could not be for him. His case was that it had been forced on him by the post pon and the disguised constable. The Deputy Magistrate found that the application to the Registrar had been written by the accused, found him guilty of the offences charged, and sentenced him to two years' rigorous imprisonment. The Sessions Judge, on appeal, altered the offences to those of attempting to cheat, under sections 417 and 511, Indian Penal Code, and forgery to commit cheating, under section 468, and reduced the sentence to one year's rigorous imprisonment. Subject to those modifications he dismissed the appeal.

The accused preferred this Criminal Revision petition.

Mr. John Adam and T. Rangaramanuja Charar for petitioner.

The Public Prosecutor in support of the conviction

JUDGMENT.—The charge of cheating must fail inasmuch as there is no proof that the deception practised by the petitioner on the Registrar of the Madras University caused harm or damage to him or to the University which he represents. If the real S. Sreenivasan had practised a similar deception for obtaining a duplicate certificate it could not be argued that he would be guilty of cheating unless damage or harm was caused to the person deceived.

There is also nothing to show that the petitioner acted dishonestly in obtaining the duplicate certificate, that is, that he had

any intention of causing wrongful gain to himself or wrongful loss to the University. On the other hand he paid three Rupees in cash for the certificate which certainly seems to be greatly in excess of its cost price. Then as to the charge of forgery,—assuming that the petitioner fabricated the document B-2, there is no evidence, for the reasons already stated, that he did so fraudulently or dishonestly and with intent to cause damage or injury to the public or to any one. The question before us is not whether he intended to use the certificate subsequently in order to obtain some temporal advantage by pretending that he had passed the Matriculation Examination. Had he had such intention this mere preparation towards such object would not amount to an attempt to commit an offence within the meaning of section 511 of the Penal Code.

We must therefore reverse the conviction, acquit the prisoner, and direct that he be set at liberty.

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APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Bhashyam Ayyangar.

KING-EMPEROR

v.

1902.
January 28

GOPALASAMY AND SEVEN OTHERS, ACCUSED.*

Indian Penal Code—Act XLV of 1860, s. 424—Dishonest removal of property to avoid distraint—Distraint for arrears of rent under the Rent Recovery Act—Absence of presumption in favour of its legality—Onus of proof on prosecution to prove legality—Conviction in absence of such proof—Illegality

Where a distraint is made under the Rent Recovery Act for arrears of rent, there is no presumption that it is legally made, and if persons are charged with having dishonestly removed property to avoid it, the prosecution must prove that it was a legal distraint. In the absence of such proof, persons who have resisted the distraint or have removed their property to avoid it, cannot be convicted of an offence, inasmuch as they had a right of private defence of their property unless the distraint was legal.

CHARGES of rioting, resisting the taking of property by the lawful authority of a public servant, and voluntarily causing hurt, under

* Criminal Revision Petition No. 431 of 1901, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of Lionel Vibert, Joint Magistrate of Tanjore, in Criminal Appeal No. 46 of 1901 presented against the finding and sentence of the Second-class Magistrate of Kodavasal in Calendar Case No. 159 of 1901.

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sections 147, 133, and 323, Indian Penal Code The petitioners were convicted of rioting and dishonestly removing property, under sections 147 and 424, and sentenced (some of them) to pay fines and (some of them) to suffer imprisonment. The case for the prosecution was that fourth accused had made default in payment of rent in respect of fasli 1310, and that a demand had been served on him by the manager of the Maruthanthanallur estate, of which he was a tenant. It was alleged that the manager had gone to the house of this accused accompanied by seven or eight persons, and demanded payment of the arrears. Fourth accused said that he would pay the amount in ten days. Some cattle and a cart were thereupon distrained, but the accused drove them away. They were accordingly charged, and convicted as above. An appeal was preferred to the Joint Magistrate, who said:—"In this Court, almost the whole ground of appeal is that the distraint proceedings were illegal. This was not put forward in the lower Court until after the charge was framed, and the lower Court, rightly or wrongly, refused to allow questions on the point. It is certainly an objection to this defence that it is only put forward as a last resort." He discussed the evidence and dismissed the appeal.

Petitioners preferred this Criminal Revision petition.

C. Sankaran Nair for petitioner.

JUDGMENT.—The distraint having been made under the Rent Recovery Act, there is no presumption that it was a legal distraint. It therefore lay on the prosecution to prove the distraint was legal, and especially so when its legality was challenged by the accused before the convicting magistrate. In the absence of such proof, the petitioners were guilty of no offence under either section 147 or 424 of the Penal Code inasmuch as they had a right of private defence of their property unless the distraint was legal. We must express our surprise at the Sub-divisional Magistrate in appeal thinking it unnecessary to consider the question which was the chief ground of the appeal to him, viz., whether the Sub-Magistrate was right or wrong in declining to enquire into the legality of the distraint.

We reverse the convictions of all the petitioners and acquit them, and direct the refund of the fines inflicted if they have been paid.

APPELLATE CIVIL.

Before Mr. Justice Blashyam Ayyangar and Mr. Justice Moore.

AKKINERI SREERAMULU AND TWO OTHERS (MINORS) BY THEIR
NEXT FRIEND MULLAPUDI RATNAM (PLAINTIFFS), APPELLANTS,

1902.
February 4.

v.

MULLAPUDI RAMAYYA AND EIGHT OTHERS (DEFENDANTS
Nos. 2, 11, 3 AND 5 TO 10), RESPONDENTS *

Limitation Act—Act XV of 1877, sched II, art 120—Alienation by widow—Subsequent suit to set it aside—Withdrawal of suit without permission to bring a fresh suit—Confirmation of original alienation—Fresh cause of action to sons of the daughters

V, who was possessed of lands, died in 1868, leaving a widow and three daughters him surviving. In 1874, the widow alienated the land. In 1892, the daughters sued to have that alienation set aside, but withdrew the suit, on the ground that the alienation was valid, without obtaining leave to sue again. In 1895, the daughters' sons instituted the present suit for a declaration that neither the original alienation nor its confirmation by the withdrawal petition in the suit should be effective as against them. On the plea of limitation being raised

Held, that the withdrawal of the suit of 1892 on the ground that the alienation was valid, without permission to bring a fresh suit, was a confirmation of the alienation of 1874, and gave a fresh cause of action, and that the suit was not barred.

SUIT to set aside alienations of land made by plaintiffs' grandmother (since deceased) and for a declaration that they were void as against plaintiffs. Veeranna, plaintiffs' grandfather, who was possessed of lands, died in or about the year 1868, leaving his widow Meenamma and three daughters (defendants Nos. 3, 4 and 5), him surviving. First plaintiff was the son of the elder daughter (defendant No. 3) and plaintiffs 2 and 3 were children of the second daughter (defendant No. 4). Defendants 6 to 10 were the sons of the third daughter (defendant No. 5). In 1874, Meenamma alienated some of her late husband's lands to the father of defendants Nos. 1 and 2. In 1892, her two daughters, the present defendants Nos. 3 and 4, the mothers of the present plaintiffs instituted Original Suit No. 57 of 1892, to have that alienation set aside, but withdrew it, on the ground that the alienation was valid,

* Second Appeal No. 499 of 1900 against the decree of J H Munro, Acting District Judge of Góidávari, in Appeal Suit No 280 of 1899, presented against the decree of E. J. S. White, District Munsif of Ellore, in Original Suit No. 85 of 1893.

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without obtaining permission to bring a fresh suit. Plaintiffs set out these facts in their plaint and alleged that the withdrawal of Original Suit No. 57 of 1892 had been effected in collusion with the alienees of the property; they claimed that neither the original alienation nor the withdrawal of the suit affected their rights; and prayed for a declaration that the original alienation of 1874 and its confirmation by the application for withdrawal should not affect the reversionary interests of the plaintiffs. Defendants Nos. 3, 4 and 5 remained *ex parte*. Defendants Nos. 1 and 2 (sons of the alienee) denied that there had been any collusion and set up the further defence of limitation. The other defendants supported plaintiffs' case.

The District Munsif declared the alienation of 1874 to be invalid as against plaintiffs. On the issue relating to the withdrawal of Original Suit No. 57 of 1892, he held that any collusion on the part of defendants 3 and 4 did not effect plaintiffs' right to bring the present suit, as plaintiffs did not claim through their mothers, and had not been parties to the previous suit. He considered it "unnecessary to dwell much upon this issue." On appeal, the District Judge held that so far as the alienation of 1874 was concerned, the suit was barred by limitation. He continued: "An attempt is made to show that even if a suit for a declaration regarding the alienation of 1874 is barred, the present suit is not wholly barred, because there is also a prayer to set aside the alienation made by the third and fourth defendants, mothers of plaintiffs, by the withdrawal application in the suit for declaration regarding the same alienation of 1874, brought by them in 1892. There is, no doubt, a prayer to this effect, but it has not been granted by the lower Court's decree and the plaintiffs have not appealed against that decree. As it seems clear that the suit is barred by limitation it is unnecessary to record findings on the remaining issues." He allowed the appeal and dismissed the suit.

Plaintiffs preferred this second appeal

P. Nagabhushanam for appellants

C. Ramachandra Rau Sahib for first and second respondents.

JUDGMENT.—The Judge is right in holding that in so far as the alienation of 1874 is concerned, this suit is barred by limitation. There is, however, also a further prayer in the plaint that the alienation made by way of confirmation of the prior alienation, by the (withdrawal) application put in, in 1892 by the third and fourth

defendants should be set aside. As to this the Judge holds that there was no doubt a prayer to this effect in the plaint, but that it had not been granted by the District Munsif and that the plaintiffs have not appealed against that decree in so far as it omitted to grant that prayer. As the decree of the District Munsif was in favour of the plaintiffs, there was nothing for them to appeal against. The judgment of the District Munsif, moreover, shows he did not disallow this prayer. We must hold that the withdrawal of the suit of 1892 on the ground that the alienation was valid without permission to bring a new suit is a confirmation of the alienation of 1874 and gives a fresh cause of action and it follows that the present suit is not barred by limitation. As the District Judge has decided the appeal upon a preliminary point which has been set aside on second appeal, we must refer the appeal back to him for disposal on the merits. Costs will follow the result.

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APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

PUTHIA VALAPPIL BARGA *alias* KUNHUNHA UMMA,
(DEFENDANT No 2), APPELLANT,

1902
February 13

v.

VELOTH ASSENNAR AND TWO OTHERS (PLAINTIFF AND
DEFENDANTS NOS. 1 AND 3), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 111—Court fees—First charge on subject-matter of suit—Purchase of portion of subject-matter at sale to recover Court fees—Subsequent purchase in execution under another decree—Validity

A suit was filed *in forma pauperis* and a decree passed, in December 1893, awarding the plaintiff therein certain land. A portion of that land was, in 1896, put up for sale in order to recover the amount due to Government as stamp fees in connection with the pauper suit, and the present plaintiff bought it. The same land was attached, in 1899, in execution of another decree, which was passed in March 1894. Plaintiff made a claim, which was rejected, and the land was sold to the second defendant, in execution of that other decree, in September 1899. Plaintiff now sued for a declaration that the land was not liable to be sold in satisfaction of the other decree.

* Second Appeal No 1193 of 1900 against the decree of M J Murphy Acting District Judge of North Malabar, in Appeal Suit No. 283 of 1900, presented against the decree of M Mundappa Bangera, District Munsif of Tellicherry, in Original Suit No 389 of 1899.

PUTHIA
VALAPPI
BARGA *alias*
KUNHUNHA
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v.
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ASSINAR.

Held, that inasmuch as the amount of the stamp fees recoverable by Government in connection with the pauper suit was a first charge on the property, under section 411 of the Code of Civil Procedure, the purchase by plaintiff prevailed as against the purchase by the second defendant.

SUIT for a declaration that certain property was not liable to be sold in satisfaction of a decree which had been passed by the High Court at Madras, in Original Suit No 202 of 1893. Plaintiff had purchased the property in question at a sale which was held for the recovery of the amount due to Government as stamp fees in connection with Original Suit No. 26 of 1893, on the file of the Subordinate Court at Tellicherry. The last-mentioned suit had been brought, *in form pauperis*, for partition of the estate of Mir Jaffer Ali Sahib, deceased, by one of his widows, Ummacha, and her children by him, against another widow and other persons. Ummacha's claim was successful, a decree being passed in her favour, subject to her paying the just debts of the deceased Jaffer Ali Sahib. The date of this decree was 20th December 1893. Execution proceedings were taken for the recovery of the amount due as stamp fees, and the property now in question, (which formed part of the property which had been decreed to the plaintiff, Ummacha), was put up for sale on 11th June 1896, and purchased by the present plaintiff, who was, in 1898, put into possession of it. After the institution of Ummacha's suit No 26 of 1892, but before the decree in it had been passed, suit No. 202 of 1893 was filed in the Madras High Court, by Hajee Abu Mahomed Saib against the executors of Mir Jaffer Ali, and a decree was obtained. The date of the High Court decree was 6th March 1894. In execution of the High Court decree, the property now in question was attached by the District Court of North Malabar. Plaintiff filed a claim petition objecting to the attachment, but it was rejected. The order, which was passed on 12th September 1899, was as follows:— "In Original Suit No. 26 of 1892, the wife and children of Mir Jaffer Ali obtained a decree *in form pauperis* for partition of their share of his property. Their share in item No. 2 was sold for court fees and was purchased by the claimant. Original Suit No. 202 of 1893 was brought in the High Court against the executors of Mir Jaffer Ali, for debts due by him, and a decree was obtained on March 6th, 1894, which is the decree now in execution. Claimant's purchase was on June 11th,

1896 It is clear that the whole of Jaffer Ali's property was liable for his debts and that therefore the purchase by claimant of a share of that property does not free it from liability for his debts. Moreover, the decree in Original Suit No. 26 of 1892 distinctly made the shares assigned to the then plaintiffs liable for Jaffer Ali's debts."

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On 14th September 1899, the property in question was put up for sale and purchased by second defendant, who obtained a sale certificate, which was filed. First defendant was the transferee of the High Court decree. Plaintiff now brought this suit for the declaration already stated. Both defendants pleaded the validity of the High Court decree and contended that the sale in the course of its execution was valid as against plaintiff. The District Munsif dismissed the suit. The Acting District Judge allowed the appeal which was preferred to him, on the ground that Mir Jaffer Ali's widow, Ummacha, had not been made a party to the High Court suit, which was against the executors alone, and as she had obtained her decree with regard to the property now in question, in Original Suit No. 26 of 1892, on the basis of her share under the Mahomedan law, the property was not liable to attachment in the other suit. He reversed the decision of the lower Court and declared that the property was not liable to attachment and sale under the High Court decree.

Defendant No. 2 preferred this second appeal.

C. Sankaran Nayar for appellant.

J. L. Rosario for first respondent.

JUDGMENT.—It appears that the property was purchased by the plaintiff at a sale held in order to recover the amount due to Government as stamp fees in Original Suit No. 26 of 1892 in which the plaintiffs therein succeeded. The property now in question was a portion of its subject-matter. Such being the case the sum recoverable by Government was a first charge on the property under section 411 of the Civil Procedure Code. The second defendant was a subsequent purchaser of the same property in execution of a decree which he obtained against the estate of the deceased for debts due by him. The Crown having a first charge on the property the plaintiff's purchase prevails as against that relied on by the second defendant. On this ground we confirm the decision of the District Judge and dismiss this second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar and
Mr. Justice Moore

1902
February 21

DAMPANABOYINA GANGI AND ANOTHER PLAINTIFFS),
APPELLANTS,

v

ADDALA RAMASWAMI (FIRST DEFENDANT) RESPONDENT. *

Civil Procedure Code—Act XIV of 1882, s. 43—Omission to include present claim for land in a former suit for other land—Ground of title similar in both suits, but defendant's, different, and different lands claimed—Maintainability.

V, who was possessed of different plots of land, namely, lands A and lands B, died, leaving a widow and two daughters him surviving. The widow, who enjoyed all the lands during the remainder of her life, also died. The daughters then attempted to take possession of the lands B from a person who held possession of them, and who wrongfully refused to relinquish that possession. They, as the heirs of their late father, thereupon, namely in 1887, instituted a suit and obtained a decree against that person for the recovery of the lands B. In 1896, the daughters attempted to take possession of the lands A, which were in the possession of another person, who also wrongfully refused to relinquish his possession. They thereupon instituted the present suit against that other person, in which they also claimed as the heirs of their late father, to recover possession of the lands A. The persons who had withheld possession of the lands B and A respectively, were different, and the High Court found as a fact that there had been no combination or privity between them in respect of the lands which they had severally withheld. Upon the objection being raised that the present suit was barred, under Section 43 of the Code of Civil Procedure, by reason of the fact that the plaintiffs had omitted to include their present claim in the previous suit

Held, that the suit was maintainable

SUIT for land and mesne profits. Silaboyina Venkatesagadu died, leaving two daughters (the present plaintiffs) as also his widow, Veeri, him surviving. He also left immoveable property which will be hereinafter referred to as lands A and lands B. These lands were, from the date of his death, enjoyed by his widow Veeri, who (apparently) alienated lands A to the present first defendant Addala Ramaswami, and lands B to one Silaboyina

* Second Appeal No. 961 of 1900 against the decree of J. H. Munro, Ag. District Judge of Gōdavari in Appeal Suit No. 344 of 1899, presented against the decree of K. S. Sambasiva Aiyar, Ag. District Munsif of Tanuku, in Original Suit No. 795 of 1896.

Gangadu. Veeri died on January 9th, 1887. After her death, Silaboyina Gangadu refused to give possession of lands B to plaintiffs, who thereupon filed Original Suit No 490 of 1887 against him and obtained, in the Lower Appellate Court, a decree for its recovery, which was affirmed by the High Court, on second appeal, on August 13th, 1890, that judgment being filed in the present suit as exhibit E. In 1896, plaintiffs instituted the present suit against the present first defendant Addala Ramaswami and another, who had wrongfully withheld the lands A from them, just as Gangadu had, previously, wrongfully withheld the lands B. The High Court found, as a fact, that there was no combination or privity between Ramaswami and Gangadu in respect of the lands A and the lands B, which comprised different plots. The plaintiff in the present suit alleged that the lands A and B had belonged to the plaintiffs' late father, who enjoyed it and who died sonless, and leaving no debts; that his property devolved on his widow Veeri, who enjoyed it during her life-time; that plaintiffs had lived in other villages with their respective husbands, and had, in consequence, been unable to gather correct information as to the extent of the property which their father had left; that shortly after the death of their mother plaintiffs obtained information that the only properties which their father had died possessed of were the lands B, and they accordingly filed Original Suit No. 490 of 1887 against Gangadu, with the result already stated. The plaintiff further stated that plaintiffs had not included a claim for the lands A in that suit because they were not then aware of their existence. They subsequently learned that the lands A were the self-acquisition of their father, and that they too had been enjoyed by their mother Veeri. They now claimed that Veeri had only a life interest in them, without powers of alienation; that there had been no necessity for any alienation; and that if she had alienated them, such alienation was not binding on the plaintiffs, who were the nearest heirs and entitled to inherit the property of their late father after the death of their mother. They added that when they had attempted to take possession of the lands A, the two present defendants had illegally obstructed them, and so this suit was filed.

One of the defences was that the suit was barred by section 43 of the Code of Civil Procedure, inasmuch as the plaintiffs had omitted to include a claim for these lands in their former suit

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No. 490 of 1887, though they had knowledge at that time that the lands were in the possession of the present first defendant. It was also pleaded that at the date of the institution of the former suit plaintiffs well knew that the lands A had belonged to their father and had been alienated by their mother (for the discharge of their late father's debts) to one Kodi Durgappa, from whom the present first defendant claimed to have acquired title and possession by purchase. The District Munsif held that plaintiffs were aware of their rights to lands A at the date of the institution of their previous suit, and that the present suit was, in consequence, barred. The District Judge, on appeal, said:—"The only question requiring decision is whether the suit is barred under section 43 of the Code of Civil Procedure. This depends upon whether the plaintiffs were ignorant of their rights at the time of the former suit and whether that ignorance was unavoidable. The District Munsif has found to the contrary, and I entirely agree with him: under the circumstances, the plaintiffs, had they chosen to make enquiries, could easily have ascertained what lands they were entitled to. Their own third witness says plaintiffs used to cultivate the lands which are contiguous to the lands in the former suit." He dismissed the appeal.

Plaintiff preferred this second appeal on the grounds, among others, that the Court below had failed to observe that the defendants in the present suit were not parties to the previous suit, and that the cause of action in the present suit was different to that in the previous suit, and that, in consequence, section 43 had no application.

V. C. Seshachariar for appellants

K. Ramachandra Ayyar and *E. Venkatarama Sarma* for respondent.

BHASHYAM AYYANGAR, J.—The point arising in this second appeal is whether the appellants (plaintiffs) are precluded by section 43 of the Civil Procedure Code from bringing this suit by reason of their having omitted to include the present claim in their former suit, Original Suit No 490 of 1887, assuming, as is apparently found by both the Lower Courts, that at the institution of the former suit they were aware that the land now sued for was in the possession of the present defendant and that the same formed part of their father's estate. The first suit was brought by these plaintiffs for the recovery of some other land which was

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in the possession of the defendant in that suit and the same was awarded to them by the decree of the Appellate Court therein, which was confirmed by the High Court in second appeal on the 13th August 1890 (Exhibit E).

The present suit was brought in 1896 for the recovery from the defendant herein, of the land mentioned in Schedule A to the plaint which is different from the land mentioned in Schedule B, the subject-matter of the former suit. The plaintiffs' ground of title in both the suits is one and the same, *viz*, that as the heirs of their father they were entitled to succeed to both the properties on the death of their mother on the 9th January 1887. The former suit was instituted against the defendant therein, by reason of his wrongfully withholding from the plaintiffs, on the death of their mother, possession of the land in Schedule B, and the present suit is brought on the defendants herein similarly withholding the land comprised in Schedule A, the defendants in both the cases having respectively come into possession of the lands comprised in Schedules B and A under separate alienations made by the mother in favour of each on a different occasion. It will thus be seen that though the ground of title is one and the same in both the suits and the cause of action in respect of both arose at the same time, *viz*, the date of the mother's death, yet the person who wrongfully withheld the land in Schedule B and the person who wrongfully withheld the land in Schedule A are quite different and there was no manner of combination or privity between them in respect of the lands which they severally withheld.

The words 'cause of action' have all along been held to mean 'every fact which it is material to be proved to entitle the plaintiff to succeed; every fact which the defendant would have a right to traverse' and have no relation whatever to the defence, but refer entirely to the grounds set forth in the plaint as the cause of action (*Cooke v. Gill*(1), *Shankar v. Dyz Shankar*(2), *Chand Kour v. Pertab Singh*(3)).

Though the ground of title on which both suits are founded is one and the same and the causes of action also arose at the same time, yet the properties comprised in the two suits are different and the persons who severally withheld the same are also different.

(1) L.R., 8 C.P., 107.

(2) L.R., 15 I.A., 66.

(3) L.R., 15 I.A., 156.

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A reference to section 50, Civil Procedure Code, clearly shows that in every suit the plaintiff must show that the defendant is or claims to be interested in the subject-matter and that he is liable to be called upon to answer the plaintiff's demand. This clearly shows that the cause of action is not an abstraction, something independent of the defendant, but that the plaintiff should disclose a cause of action against the defendant. And section 43 only provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action and that if a plaintiff omit to sue in respect of any portion of his claim arising from the cause of action for the enforcement of which the suit is brought, he shall not afterwards sue in respect of the portion so omitted. In the former suit the plaintiffs were entitled to call upon the defendant therein only to answer the demand in respect of the land comprised in Schedule B in which alone that defendant was and claimed to be interested. If the land in Schedule A had also been withheld by him from the plaintiffs, plaintiffs' claim to the same would be only a part of the claim which they were entitled to make against that defendant and section 43, Civil Procedure Code, would be a bar to the present suit if he were the defendant herein or the defendant herein were a person claiming under him. In respect of the land in Schedule B the plaintiffs' cause of action was only against the defendant in the former suit, and in respect of the land in Schedule A their cause of action is only against the defendant herein, and in my opinion it is impossible to hold that the former suit did not include the whole of the claim which the plaintiffs were entitled to make in respect of the cause of action on which that suit was founded, and that the claim in the present case is a part of the claim which they were bound to make in the former suit: in other words, that a cause of action against one person is a part of the cause of action against another though it is not a joint one against both.

In *Pittapur Raja v. Suriya Rau*(1) in which section 7 of Act VIII of 1859 (corresponding to section 43 of Act XIV of 1882) was pleaded as a bar to a subsequent suit between the same parties, their Lordships of the Privy Council explained the law as follows (at page 524):—"That section does not say that every suit shall

(1) I.L.R., 8 Mad., 520.

include every cause of action, or every claim which the party has, but 'every suit shall include the whole of the claim arising out of the cause of action'—meaning the cause of action for which the suit is brought. The claim in respect of the personalty was not a claim arising out of the cause of action, which existed in consequence of the defendants having improperly turned the plaintiffs out of possession of Veeravaram. It was a distinct cause of action altogether, and did not arise at all out of the other. It is not like the case of one conversion of several things. There the act of conversion of the several things is one cause of action, and you cannot bring an action for the conversion of one of the things, and a separate action for the conversion of another. The conversion of the whole is one claim and one cause of action." (See also *Moonshee Buzloor v. Shumsoonnissa Begum*(1)). In *Pittapur Raja v. Suriya Rau*(2) the parties were the same in both the suits but the subject-matter different. Neither will section 43, Civil Procedure Code, be a bar to a suit against one of two or more joint and several obligors, though for the same debt a suit had been already brought and decree obtained against another of such obligors (per Baron Bayley in *Lechmere v. Fletcher*(3), *Dhampur Singh v. Sham Sunder Mitter*(4)). In such a case the defendants are different in the two suits but the subject-matter is the same. The present case is stronger than either of the above classes of cases, the defendants as well as the subject-matters being different in the two suits. The wrongful withholding of Blackacre by X and the wrongful withholding of Whiteacre by Y, cannot constitute the same cause of action, by reason only of the plaintiff's ground of title both to Blackacre and Whiteacre being the same, when he sues X and Y separately in respect of Blackacre and Whiteacre respectively, alleging the same ground of title, but distinct wrongful withholding by each of them. I may also here refer to more than one decision of this Court in which it was held that a suit for a mere declaration of right to any property under section 42 of the Specific Relief Act is not obnoxious to the proviso thereto, by reason of the plaintiff being able to seek further relief in respect of such property against a person other than the defendant in the suit (*Subramanyan v. Paramaswaran*(5), *Chinnammal v. Varadarajulu*(6)).

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(1) 11 M.I.A., 551 at p. 605.

(3) 1 C. and M., 623, at p. 635.

(5) I.L.R., 11 Mad., 116, at p. 122.

(2) I.L.R., 8 Mad., 520.

(4) 5 Calc., 291.

(6) I.L.R., 15 Mad., 307, at p. 310.

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The very question arising in this case was considered by a Full Bench of the North-West Provinces High Court, in 1867, in *Jehan Bebee v. Saiyuk Ram*(1) and it was there held that it was not obligatory on the heirs to make all the alienees parties to the first suit, upon pain of forfeiting all future right of suit against them by reason of such omission. The reasoning on which the decision proceeded is as follows:—"As against the widow the cause of action is based upon the fact that she has made an alienation of the inheritance in excess of her interest. As regards an alienee, the cause of action arises from the circumstance, that the possession of a part of the inheritance is wrongfully withheld. Although the alienation may have been wrongful, it does not follow that an heir is entitled to recover possession from the alienee. Such an alienee, if a purchaser or mortgagee, may, under the doctrines laid down in *Hanooman Persaud Panday v. Munraj Koonwaree*(2) successfully defend his possession by proving that he acted honestly and with due caution, but was himself deceived—and yet the heir might, although he could not succeed in a suit against the alienee, recover damages from the widow for her wrongful act. For the same reason (*i.e.*, that the cause of action against the alienee is the wrongful withholding of possession) the heir's cause of action as against different alienees who have acquired possession under alienations made at different times and under different circumstances, is not one and the same cause of action, as is admitted by the respondent's pleaders. To apply these conclusions to the case before us—the plaintiffs sued on the same title in the former and in the present suit and the question as to the widow's right to alien arose equally in each case. But the sales were distinct, different lands having been sold at different times to different purchasers."

A different view was taken in an earlier decision of a Full Bench of the Sadr Dewany Adalat of North-West Provinces. (*Fyz Ali Khan's case*, 20th March 1866) which however was distinguished in the above case (*Spankie, J.*, dissenting). In *Fyz Ali Khan's case*, the reversionary heir, Rao Kaurun Singh, sued to establish his title to twenty-seven villages which had formed the estate of Dhuleep Singh who died in 1846 and was succeeded by

(1) Agra High Court Reports, Full Bench, Vol. I, part III, p. 109.

(2) 6 M.I.A., at p. 393.

his widow and mother successively. The widow died in 1856. Rao Kurrin Singh's grand-father was the heir-at-law, but he was a lunatic and Rao Kurrin Singh, on his own account and as guardian of his lunatic grand-father, sued to establish his title to the property which had been alienated by the widow with the concurrence of the mother of Dhuleep Singh, joining the mother as a party to the suit along with the alienees. She died during the pendency of the suit and Rao Kurrin Singh succeeded and obtained proprietary possession of the twenty-seven villages, though not actual possession of three of them, which were in the possession of mortgagees, who had not been made parties to the suit. The mortgages had been made by the widow, with the concurrence of the mother, prior to the permanent alienations which were set aside by the decree in the suit as not binding upon the reversionary heir. Subsequently, Rao Kurrin Singh sued the mortgagees to avoid the mortgages as unlawful and recover full possession of the three villages in their possession. The second suit was dismissed by a Full Bench on the ground that Rao Kurrin Singh's cause of action was Dhuleep Singh's widow's death and he had to establish his title to his property the whole of which had been alienated by the widow and the mother and as he did not include the mortgagees in the first suit, though he did sue and obtain proprietary possession of the estate, he could not subsequently sue to avoid the mortgages as unlawful. Appeals were preferred to Her Majesty in Council from the decision of Sadr Dewany Adalat in the first suit and from the Full Bench decision in the second suit (*Koor Goolab Singh v. Rao Kurrin Singh*(1); *Rao Kurrin Singh v. Fyz Ali Khan*(2)). Both the appeals are dealt with in one common judgment, the result being that the appeal from the first suit was dismissed, but the appeal from the second suit was allowed and the Full Bench decision of the Sadr Dewany Adalat reversed on the ground that the second suit was based on a different cause of action from the first and that section 7 of Act VIII of 1859 was therefore no bar to the subsequent suit. It will be seen that out of the twenty-seven villages which formed the subject-matter of the first suit and had been alienated to the defendant therein, for a purpose not binding upon Rao Kurrin Singh, the next reversionary heir, three villages had already been

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(1) 14 M.I.A., 176.

(2) 14 M.I.A., 187.

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mortgaged to, and were in the possession of, the defendant in the subsequent suit, the purpose for which the property was thus mortgaged being also found not to be one that would be binding upon the reversionary heir. The three villages were included in the first suit and also formed the subject-matter of the second suit, the equity of redemption thereof being alone comprised in the former suit, and the mortgage estate which had been carved out of the said three villages constituting the subject-matter of the second suit and defendants also being different in the two suits. The ground of title on which the two suits were founded was one and the same, as in the present case and the cause of action in each also arose at the same time and in one sense, so far as the three villages in question were concerned, the two suits related to different interests in the same property. Their lordships of the Judicial Committee, in reversing the decision of the Full Bench, laid down that the true test of the proper application of the section in question as a bar to a subsequent suit in any particular case must be whether there has been a splitting of the cause of action, that upon the above facts the two suits cannot be regarded as having been based upon the same cause of action and the second suit cannot therefore be said to have been brought upon a splitting of the cause of action. In *Mothoor Mohun v. Khemunkuree*(1) the same view was taken by the High Court of Calcutta and the operation of section 7 of Act VIII of 1859 explained as follows:—

“Section 7 of Act VIII of 1859 requires that, if all rights arising out of the *same cause of action* are not sued for together, the portion abandoned cannot be separately sued for afterwards but does not enact similar penalty for all rights under the *same* or similar titles, the right to sue for which may arise under *different* dates and *causes of action*, and the defendants as to which different properties may be either only one party, or different parties altogether.”

These are direct authorities in favour of the appellants' contention. The respondent's pleader chiefly relies upon the unreported decision of this Court in *Subbannavien v. Krishna Royar*(2), where in a case which was substantially the same as the present, it was held by a Division Bench that section 43, Civil Procedure Code, was a bar, the only difference between that case and the present being

(1) 5 Suth. W.R., 182.

(2) Appeal No. 182 of 1896,

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that in the former the plaintiff in the second suit was not the rever-
sionary heir himself, but a person claiming under him under an
alienation made subsequent to the first suit. This, however, is only a
circumstantial difference and it must be admitted that that decision
fully supports him. But the above decision of the Privy Council
does not appear to have been brought to the notice of the learned
Judges who decided that case and their decision cannot be recon-
ciled with that of the Privy Council. The respondent's pleader
is not able to cite any other case in which under similar circum-
stances section 43, Civil Procedure Code, was held to be a bar.

The decision in *Subbannavien v. Krishna Royar* (1) purports to be
based upon a course of decisions in this Presidency in which it was
held that a suit relating to various properties in the possession of
different defendants who claimed under different alienations made
by a widow or by a Karnavan or the managing member of a
Tarwad or a joint Hindu family, is not open to the objection of
misjoinder of defendants and of causes of action, when the plain-
tiff's ground of title to all the properties included in the suit is
the same (2). With all deference, I venture to state that the
course of decisions referred to does not warrant the inference
drawn therefrom that the plaintiff is bound to include all the
properties alienated and the alienees in one and the same suit, and
that if he omits to do so, his subsequent suits are obnoxious to
section 43, Civil Procedure Code. A person suing for partition of
an estate or for an estate which has devolved upon him by inheri-
tance may so shape his plaint as to base it upon a single cause of
action, the various defendants being joined as parties in possession
of the estate. Further, under section 28, Civil Procedure Code,
relating to the joinder of different persons as defendants, it is open
to a plaintiff to join as defendants various persons against whom
the right to relief is alleged to exist, whether jointly, severally or
in the alternative in respect of the *same matter*. And judgment
may be given against such one or more defendants as may be
found to be liable, according to their respective liabilities. It
would be noted that the phrase 'in respect of the *same matter*'
occurring in this section, is wider than the phrase 'in respect of
the *same cause of action*' occurring in section 26, Civil Procedure

(1) Appeal No 182 of 1896.

(2) 7 M.H.C.B., 290, 1 L.R., 11 Mad., 106; 12 Mad., 234, 15 Mad., 19.

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Code, relating to the joinder of different persons as *plaintiffs* in the same suit. (*Raghunath v. Sarosh*(1)). I need hardly add that the expression in section 43, Civil Procedure Code, is 'cause of action' and not 'matter.' In *Ishan Chunder v. Rameswar*(2) it was held, following the decision of this Court(3) above referred to, that "In a suit for ejectment against several defendants who set up different titles to various parts of the land claimed, there was only one cause of action" and it was observed that 'in England in an action in ejectment all the parties in possession are joined.' Under the English law, the persons to be made defendants in an action in ejectment, i.e., to be named in the writ, are all the persons in possession of the land sought to be recovered; and the persons who have a right to defend an action of ejectment are not only the persons named in the writ, but also any person who is in possession by himself or his tenant (Rules 112 and 113; pp 494--98, Dicey's 'Parties to an action,' edition of 1870) As to cases in which different persons are in possession of different portions of the property, the rule laid down in Cole on 'Ejectment' (page 76) is as follows:-- When the tenements claimed and the tenants thereof are numerous, it is frequently advisable to bring two or more distinct ejectments rather than one action against all of them for the whole of the property. The exercise of a sound discretion and judgment on this point may sometimes save much trouble' Under the English law and practice, in an action of ejectment, the plaintiff need include in the action only those who are in possession of the land for the recovery of which the action is brought and in cases in which the plaintiff, as heir-at-law, may have to recover different portions of the inheritance which are in the possession of different persons, he must exercise a sound discretion and judgment as to whether it would be expedient to bring one action of ejectment against all the defendants or different actions in ejectment against different persons in respect of the tenements in their respective possession.

Whether the action is based only upon one cause of action or not will depend upon the frame of the plaint in a suit for ejectment and not upon the answers to the suit, which may be set up by the different defendants Even if the plaint is not based upon

(1) I.L.R., 23 Bom, 266

(2) I L R., 24 Calo, 831.

(3) In 7 M.H.C.R., 290 and I.L.R., 11 Mad, 106.

one and the same cause of action, yet if the relief that is claimed severally against the different defendants be in respect of the same matter, section 28, Civil Procedure Code, will save it from the objection of multifariousness.

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For the above reasons and following the Full Bench decision of the N-W.P. High Court(1) and the decision of the Privy Council(2) I would allow this second appeal and, reversing the decree of the Lower Appellate Court, remand the appeal for disposal on the merits. Costs of this second appeal will be costs in the cause.

MOORE, J.—I concur

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Moore.

THE MUNICIPAL COUNCIL OF MANGALORE, BY THEIR
CHAIRMAN (DEFENDANT), PLAINTIFF,

1901
September 26,
27, 30.
1902.
March 21.

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(PLAINTIFF), RESPONDENT. *

Madras District Municipalities Act—Act IV of 1884, sched A—Shopkeeper or trader—District Forest-officer—Depot for sale of forest produce conducted by representative of Government—Liability to taxation

A District Forest-officer, who, as the representative of Government, conducts a depot for the sale of forest produce, is not liable to taxation under schedule A of the Madras District Municipalities Act, 1884, as a "trader" or "shopkeeper"

SUIT to recover a sum of money which, plaintiff alleged, had been illegally levied by the defendant council, by way of tax, under section 56 and schedule A of the Madras District Municipalities Act (IV of 1884). The tax in question had been recovered from the District Forest-officer at South Canara, it being contended that he was a "shopkeeper" or "trader" within the meaning of the Act. The plaint stated that, for the purpose of forest conservancy,

(1) In *Jehan Bebee v. Sarvuk Ram*, supra

(2) In *Rao Kuruman Singh v. Fyz Ali Khan*, supra

* Civil Revision Petition No 372 of 1900 under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Mangalore in Small Cause Suit No. 368 of 1900.

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matured trees were felled, fallen timber was cut up and removed and other forest products were sold to recoup, in some measure, the expenses of the conservancy depots, for the storage and sale of those products being opened, at various places, and among others at Mangalore, within the limits of the municipality. Plaintiff denied his liability to pay the tax. For the defence it was pleaded that the tax had been properly levied and that the suit was not maintainable. The District Munsif framed issues on both points, as well as one raising the question whether plaintiff was a trader in respect of the timber or forest produce stored by him in the depot within the municipal limits. He considered whether the Secretary of State in Council was a "person," within the general meaning of that term, and within the meaning of Act IV of 1884, and also whether he was a "trader," for the purposes of that Act, and held that plaintiff was neither a "person," in the sense stated, nor a trader. He ordered the defendant council to refund the amount of the tax which had been levied.

Defendant preferred this civil revision petition

H. Narayana Rao, for petitioner, contended that the tax had been properly levied. He referred to sections 47 and 53 and to schedule A, clause 3, of the Madras District Municipalities Act, and submitted that Government can carry on trade in this country. The case of the *P. and O.S.N. Co. v. The Secretary of State for India*(1) showed that exceptions were made in the case of certain industries, such as that connected with salt, and that these were carried on by Government alone. The same liabilities lay, in consequence, on Government, when so carrying on a trade, as on private traders. The position of the East India Company was analogous. In *Jennings v. Madras Municipal Commission*(2), an orphan fund was held liable to tax, and Government must be intended to be included in section 52. The object of the Act was to impose a tax on the trade and not on the trader who carried it on. He also referred to *Kinlock v. The Secretary of State for India*(3), and to *Venkata Reddi v. Taylor*(4).

Mr. *J. G. Smith* (for the Government Pleader), contended that the only relevant question was whether the plaintiff could be a "trader," and referred to the definition of a "trader" in the

(1) 5 Bom. H.C., App 1, at p. 11

(3) L.R., 15 Ch. D. 1, at p. 8.

(2) I.L.R., 11 Mad., 253.

(4) I.L.R., 17 Mad., 100.

English Bankruptcy Act of 1869, and cases decided under it, *e.g.*, *Patton v. Brown*(1), *In re Cleland*(2), *Ex parte Gallimore*(3). *Venkata Reddi v. Taylor*(4), was only a dictum, and was in conflict with the English decisions.

The Court passed the following

ORDER.—The District Forest-officer of South Canara, as the representative of Government, *i.e.*, of the Secretary of State for India in Council, has been assessed by the Municipal Council of Mangalore under the last clause of class III, in schedule A, appended to Act IV of 1884 (Madras), as a shopkeeper or trader. The District Forest-officer paid the tax charged and the Secretary of State for India in Council filed a suit in the Court of the District Munsif of Mangalore to recover the amount so paid. The District Munsif gave the plaintiff a decree as sued for and the municipal council, by this civil revision petition, pray the High Court to set aside this decree.

A great deal has been said at the hearing of this case before the District Munsif as to whether the Secretary of State in Council can be held to be a 'person,' within the meaning that should be attached to that term as used in the schedule already alluded to. It is, however, not necessary to consider this question as the Secretary of State has not been assessed as a person under class II, clause 2, class III, clause 1, or any other clause set out in the schedule, but as a shopkeeper or trader. The provisions of Act XI of 1881 show clearly that the view taken by the District Judge of South Canara when this case came before him (Appeal Suit No. 130 of 1898), that the Secretary of State in Council is not liable to pay municipal taxes, is not in accordance with the principles followed by the Legislative Council of the Government of India. As far as can be ascertained from the evidence, the District Forest-officer of South Canara does not sell anything at the forest depot under his management in Mangalore except forest produce taken from the forests belonging to Government in that district. Such being the case, we are inclined to hold on the record as it stands that, in so far as these transactions are concerned, the Secretary of State in Council cannot be held to be a trader. In a number of judicial decisions quoted at the hearing, a trader

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(1) 7 Taunt, 409.

(2) L.R., 2 Ch. App., 466.

(3) Rosc's Bankruptcy Cases 424.

(4) I.L.R., 17 Mad., 100.

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has been held to be a person who habitually buys and sells with a view to profit and this definition is in accordance with popular phraseology. We should hesitate to decide that a person who is not shown to be in the habit of selling anything except the produce of his own land is a trader. Reference has, however, been made to the decision in *Venkata Reddi v. Taylor* (1), where it was held by Parker, J., that a Taluk Sheristadar who sold paddy grown on his own land was a trader within the meaning of Act IV of 1884. Muthusami Aiyar, J., and Best, J., however, when Mr. Justice Parker's order came before them on appeal, qualified the above finding by ruling as follows:—"We do not think the fact of what he sells being the produce of his own land makes him the less a trader, provided the sales are conducted in a shop or place of business." The only evidence on the record is a deposition of the District Forest-officer and it is not sufficient to enable us to decide if the sales of forest produce in Mangalore are conducted in a "shop or place of business" or not. The Secretary of State has been assessed as a trader or shopkeeper. The District Munsif has found that he is not a trader but has not considered the question as to whether he is liable to be taxed as a shopkeeper. In order, therefore, to enable us to dispose of this revision petition we are of opinion that the District Munsif should be called on to try the following issue:—

"Is the plaintiff liable to be assessed as a shopkeeper under class III, clause 7, of schedule A, appended to Act IV of 1884 (Madras)?"

Further evidence may be taken. The finding should be submitted within one month from the date of the receipt of this order. Seven days will be allowed for filing objections.

In compliance with this order the District Munsif returned a finding to the effect that the depot in question was not a shop.

The case came on for disposal before the same Bench, when their Lordships delivered the following

JUDGMENT.—The finding is that the depot is not a shop and we accept that finding. It follows that the District Forest-officer is not a shopkeeper. We have already found that he is not a trader. We therefore dismiss this revision petition with costs.

(1) I.L.R., 17 Mad., 100.

APPELLATE CIVIL.

*Before Sir Arnold White, Chief Justice, Mr. Justice Benson
and Mr. Justice Bhashyam Ayyangar.*

REFERENCE UNDER STAMP ACT, s. 57.*

*Stamp Act—Act II of 1899, ss. 32, 57—Reference to High Court—Determination
by Collector as to duty leviable final—"Case"—Jurisdiction of High Court.*

1901.
November
29.

An adjudication by a Collector, under the powers conferred on him by section 31 of the Stamp Act, 1899, as to the duty with which an instrument is chargeable is, by section 32 of that Act, final, and such a case cannot be referred by the Revenue authorities to the High Court under section 57 of the Stamp Act for an adjudication.

REFERENCE to the High Court under section 57 of the Stamp Act of 1899 (Act II of 1899) for a ruling as to the stamp duty chargeable on two documents. The documents in question purported to be mortgages of crops to secure the repayment of loans amounting to Rs. 23,244-12-1 and Rs. 2,29,291-5-3, respectively, but they also contained a clause giving the mortgagees a lien on the estates on which the crops were to be grown, "to subsist so long as any sums are due or owing to them." These documents were forwarded for adjudication of stamp duty under section 31 of the Act to the Deputy Collector who held that they were chargeable under article 40 (c) in addition to article 41 of schedule I to the Stamp Act of 1899. He levied duties amounting to Rs. 70-12-0 and Rs. 688-12-0, respectively, having regard to the statement made by the mortgagees at the time of the application that the documents were intended to cover advances up to Rs. 23,000 and Rs. 2,29,500, respectively. The mortgagees now applied to the Board of Revenue for a refund of duty on the ground that the documents were not chargeable under article 40 (c). The reference suggested that the article as worded appeared to apply only to cases where a second document is executed offering additional security in respect of a loan secured by a previously stamped mortgage; also that the clause relating to the lien on the estate did not constitute a distinct matter within the meaning of section 5, and was only ancillary.

* Referred Case No. 12 of 1901, stated, under section 57 of Act II of 1899, by the Secretary to the Commissioner of Salt, Abkari and Separate Revenue, Madras, in his letter, dated 1st October 1901, Mis. No. 473.

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The parties were not represented

JUDGMENT —Under the powers conferred on him by section 31 of the Stamp Act the Collector has determined the duty with which the two instruments are chargeable. The effect of section 32 of the Act is to make a determination by the Collector which has been duly endorsed on the instrument in question final in respect of that instrument. In our opinion, this is not a case which can be referred by the Revenue authorities to the High Court under section 57 of the Act. The word "case" as used in that section means a matter which has to be disposed of by the Revenue authorities conformably to the judgment of the High Court on the case referred to it for opinion by the Revenue authorities (see section 59, sub-section 2 of the Act). As, in our opinion, the point which has been referred to us is not a "case" to which section 57 of the Act applies, we must hold that we have no power to adjudicate in the matter.

In references under the Stamp Act it seems to us desirable that Counsel should be instructed to appear.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.

REFERENCE UNDER STAMP ACT, s 57.*

Stamp Act—Act II of 1899, s 57—Certificate by Deputy Collector under s 40 (1) (a) exempting documents from stamp duty—Reference by Board of Revenue to High Court—Jurisdiction of High Court to decide the question.

A Sub-Registrar, acting under section 33 of the Stamp Act, 1899, impounded two documents which had been produced before him for registration, and, under section 38 (2), forwarded them to the Deputy Collector, who, under section 40 (1) (a), certified that they were exempt from stamp duty. The Inspector-General of Registration disagreed with the opinion formed by the Deputy Collector and reported the matter to the Board of Revenue for orders. The Board of Revenue referred the question as to the stamp duty, if any, payable on the documents to the High Court, under section 57 of the Act.

Held (the Chief Justice dissenting), that the High Court had no jurisdiction to decide the question.

* Referred Case No 14 of 1901, stated, under section 57 of Act II of 1899, by the Secretary to the Commissioner of Salt, Abkari and Separate Revenue, Madras, in a letter No. G.R. 1314, dated 14th December 1901.

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REFERENCE.—The question referred, for the decision by the High Court, was as to the stamp duty chargeable on two documents written on plain paper, and described as agreements for lease, and evidencing the transfer to private individuals, by the Forest Department, of the right to collect and remove minor forest produce in certain areas under its control for a specified term on payment of a certain sum of money. The Sub-Registrar of Ambasamudram, before whom the documents were produced for registration, impounded them on the ground that they were chargeable as leases; but the Head-Quarter Deputy Collector, Tinnevely, to whom they were forwarded for adjudication of stamp duty, certified that they were exempt from duty. The Inspector-General of Registration, disagreeing with the opinion of the Deputy Collector, referred the matter for the orders of the Board of Revenue, expressing the opinion that the documents were chargeable as agreements under article 5 (b) of schedule I of the Stamp Act, 1899. The Board of Revenue expressed the view that the documents should be ranked as leases, in accordance with a previous ruling. The Board therefore caused this reference to be made asking for a definite ruling as to whether the documents were, for the purposes of the Stamp Act, leases, or instruments in the nature of a memorandum or agreement entered into by a contractor for the due performance of his contracts, and they referred to Government of India Notification No 785, S R., dated 17th February 1899, paragraph 41.

The reference came on for hearing before a Court constituted as above.

The Acting Government Pleader for the Board of Revenue.

The Court expressed the following opinions :—

SIR ARNOLD WHITE, C J —The documents in this case were impounded under section 33 of the Stamp Act, 1899. They were forwarded to the Collector who certified by endorsement on the instruments, under section 40 of the Act, that they were not chargeable with duty. The Inspector-General of Registration referred the matter to the Revenue Board, and the Board have stated a case for decision by the High Court.

The first question for consideration is—Is this a case which can be referred by the Revenue authorities to the High Court under section 57 of the Act? It is clear the case does not come within the words of sub-section (2) of section 56. The question is,

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Section 56 (1) provides that the powers exercisable by a Collector under chapter IV and chapter V shall in all cases be subject to the control of the Chief Controlling Revenue Authority. The section under which the Collector certified that the instruments in question were not chargeable with duty is section 40, and this section finds a place in chapter IV of the Act. By virtue of section 56 (1) the powers exercisable by a Collector under section 40 are in all cases subject to the control of the Revenue Board. It seems to me that a case which is brought to the notice of the Revenue Board in connection with the exercise by the Collector of any of the powers which are declared to be subject to the control of the Board is a "case . . . otherwise coming to" the notice of the Board within section 56 (2) and a case which has to be disposed of by the Revenue authorities conformably to the judgment of the High Court [section 59 (2)] It would be otherwise if section 56 (1) did not empower the Board, in the exercise of its controlling authority, to take action in connection with the exercise of a given power by a Collector after the power had been exercised. It is true the words are "powers exercisable" and not "powers exercised"; but it seems to me it would be placing too narrow a construction on the words to limit them to cases where a power has been conferred but has not in fact been exercised.

Such a construction would reduce the controlling authority conferred upon the Revenue Board by section 56 almost to a nullity. I think the words cover a case where the power which the Revenue Board seeks to control has in fact been exercised. Possibly this interpretation of the Act may give rise to administrative difficulties, but this possibility does not seem to me a sufficient reason for not giving what appears to me to be the natural meaning to the words of section 56 (1). The sub-section is new. The Act of 1879 contained no similar provision. In introducing the sub-section into the new Act the Legislature appears to have deliberately reverted to the policy of the Act of 1869.

No doubt, section 24 of the Act of 1869, which corresponds with section 40 of the present Act, provided that the certificate should be conclusive evidence subject to the provisions of the section in the Act of 1869 which conferred revisional and appellate powers upon the Revenue Board, whereas section 40 (2) of the present Act contains no such qualifying words, but this again does not seem to me a sufficient reason for restricting the application of the general words of section 56 (1) to cases where a power has been conferred but has not in fact been exercised

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I need scarcely point out that the reference now before us is essentially different from Referred Case No 12 of 1901(1) in which this Court held that it had no power to adjudicate. In Referred Case No. 12 of 1901 the determination by the Collector was under section 31. Under that section the determination of the Collector is final, and the powers conferred upon him by the section are not subject to the control of the Revenue Board

I think the present reference comes within the terms of section 57.

BHASHYAM AYYANGAR, J —Two unstamped documents were presented for registration to a Sub-Registrar who, under section 33 of the Stamp Act of 1899, impounded them as, in his opinion, they ought to have been stamped, and, under section 38 (2), sent them in original to the Collector. The Collector thereupon, proceeding under section 40 (1) (a) and being of opinion that the instruments were not chargeable with stamp duty certified by endorsement that they were not chargeable with stamp duty. The Inspector-General of Registration brought the matter to the notice of the Board of Revenue as in his opinion the view taken by the Collector was not sound. The Board of Revenue treating the matter as a case which has come to its notice otherwise than on a reference made to it by the Collector under section 56 (2), refers the same under section 57, for the decision of this Court

The preliminary question which has been argued is whether there is any case now pending, within the meaning of section 57, which the Board of Revenue is to dispose of under section 59 (2) in conformity with the judgment of this Court.

Upon the above facts which appear from the statement of the case by the Board of Revenue, I am clearly of opinion that there

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is no case now pending, with reference to the liability to stamp duty of the said two instruments to which the decision of this Court can be applied and therefore it was incompetent for the Revenue Board to make a reference under section 57 and this Court has no jurisdiction to decide the question referred to it and deliver judgment thereon (*vide* judgment in Referred Case No. 12 of 1901(1)).

The learned pleader for the Board of Revenue seeks to distinguish the present case from that in Referred Case No. 12 of 1901 on the ground that the certificate by the Collector in this case was under chapter IV of the Act and not under chapter III, as in the other, and contends that therefore the certificate is subject to the control of the Board of Revenue under section 56 (1) and can therefore be revised by that authority under that section. If this contention can be upheld, the reference made to the High Court will be in order and the decision of this Court can be applied to the said two instruments. But I find it impossible to accede to this contention and adopt a construction of section 56 (1) which will have far-reaching consequences which the whole scheme of the Act shows could not have been in the contemplation of the Legislature.

I shall now advert to the various provisions of the Act which, in my opinion, conclusively show that a certificate made by the Collector under section 40 (1) (a) cannot be revised by the Board of Revenue or any other authority and that it would not be possible to give legal effect to the decisions of this Court if a judgment were given that the certificate of the Collector was erroneous.

Sub-section (2) of section 40 runs as follows:—"Every certificate under clause (a) of sub-section (1) shall, for the purposes of this Act, be conclusive evidence of the matter stated therein." Sub-section (3) then provides that the Collector shall, after certifying by endorsement that an instrument sent to him, as in this case, under section 38 (2) is not chargeable with stamp duty, return it to the impounding officer and, under sub-section (2) of section 42, the impounding officer has to deliver it to the person from whose possession it came into his hands. The proviso to section 42 (2)—as to the detention of the document—does not apply to the present case, inasmuch as the instrument in question was dealt with by the Collector under section 40 and not by a Court under section 35. The instruments in question having been

1) Page 751 *supra*.

impounded by the Sub-Registrar, he was bound, when under section 40 (3) they were returned to him by the Collector, to register the same and return them to the person or nominee of the person who presented them for registration. And I presume that both the Collector and the Sub-Registrar did their duty and that the instruments are not now in the possession either of the Collector or of the Sub-Registrar and that the Inspector-General forwarded to the Board of Revenue only copies thereof. This is the procedure prescribed by the Act, but if by some accident or unlawful detention by the Sub-Registrar the instruments are still in his custody, that cannot affect the right construction to be placed upon section 56 (1).

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In the case of an instrument admitted in evidence by a Court, upon payment of duty and penalty under section 35 as adjudged by such Court, the Court is required by section 38 (1) to send to the Collector an authenticated copy of such instrument together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and to remit such amount to the Collector; and, under the proviso to section 42 (2), the Court is enjoined not to deliver the instrument to the party before the expiration of one month from the date of impounding it, and it is competent to the Collector to direct its further detention, if necessary, in order that he may take action under section 61 if, in his opinion, the proper stamp duty and penalty have not been levied by the Court—by bringing the same to the notice of the Court to which the Court admitting the instrument in evidence is subordinate. A reference to section 61 will show that the Appellate Court may revise the decision of the Subordinate Court and determine the amount of duty with which the instrument is chargeable and may require the person in whose possession or power the instrument then is to produce the same and may impound the same when so produced. It will thus be seen that even if the instrument is not in the custody of the Court—under the proviso (a) to section 42 (2)—the Appellate Court is empowered to require the person in whose possession or power it is, to produce it. Under section 61 (3) the Appellate Court sends to the Collector a copy of the declaration made under sub-section (2) as well as the instrument itself, if the same has been impounded or is otherwise in the possession of the Court. Under sub-section (4) the Collector may thereupon prosecute the person criminally if he

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does not pay the stamp duty and penalty as adjudged by the Appellate Court, or even when he makes such payment, if the Collector thinks that the offence was committed with an intention of evading payment. Notwithstanding that, for the protection of stamp revenue, section 61 enables the Appellate Court to revise the decision of a Subordinate Court on questions of stamp duty, proviso (b) to section 61 (4) expressly declares that the declaration of the Appellate Court under sub-section (2) as to higher stamp duty and penalty shall be valid only for the purpose of a criminal prosecution—if the Collector deems fit to institute such prosecution—but that such declaration shall not affect the validity of the order of the Subordinate Court admitting it in evidence or of the certificate, granted by it under section 42, that the proper stamp duty and penalty have been levied, notwithstanding that the same is less than that declared by the Appellate Court.

In the case of an instrument impounded by the Collector under section 33, when it is produced in his office or received by him from another officer under section 38 (2), the Collector may act either under clause (a), or clause (b), as the case may be, of section 40 (1). If he acts under clause (a), he certifies under that very clause and such certificate is declared to be conclusive by sub-section (2). If he acts under clause (b) and levies duty and penalty, he certifies under section 42—the very section under which Courts too, acting under section 35, certify by endorsement—and section 42 (2) declares that every instrument so endorsed shall be deemed to have been duly stamped. However, it is only the certificate of the Court under section 42 that is subject to the operation of section 61, and if it was intended that the certificate of the Collector—whether made under section 40 (1) (a) or 42 (1)—should be subject to revision by the Board of Revenue, surely provisions similar to those contained in section 61 and the proviso (a) to section 42 (2), would have been enacted for giving effect to such revision of the Collector's order by the Board of Revenue. As already observed, even in regard to certificates of Courts, their validity is in no way affected by the declaration of the Appellate Court under section 61 (2) that a higher duty and penalty were leviable.

If section 56 is construed as empowering the Board of Revenue to revise the certificate of a Collector made under section 40 or 42, it will follow that it can do so without making any reference to the High Court, or, in the event of its entertaining any doubt, after

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making such reference; and it is inconceivable that, if the Legislature intended that the Board should have the power to revise such certificates, no provision should have been made in such a complete code as the Stamp Act to give effect to the decision of the Board in revision or to the decision of the High Court on reference. In the present instance, suppose, as is presumably the case, the instruments have been registered and delivered to the party. The learned pleader for the Board of Revenue is not able to say what the Board is to do if this Court decides that the instruments were liable to stamp duty. Clause (b) of the proviso to section 35 declares that, notwithstanding the general provision that an instrument not duly stamped shall not be admitted in evidence for any purpose or registered, a certificate of the Collector made under any provision of the Stamp Act shall remove such bar. Sub-section (2) of sections 40, 42 and 44 declare that the certificate shall operate as conclusive evidence that the instrument is duly stamped, or that it is not liable to stamp duty, as the case may be; and the only exception thereto is that provided by section 61, viz., that in the case of a certificate granted by a Court under section 42 being superseded by a declaration of the Appellate Court under section 61 (2), the certificate shall have no validity against a criminal prosecution.

The argument of the learned pleader for the Board of Revenue, that if the Board cannot revise a certificate made by a Collector under section 40 or 42, section 56 (1) will be practically inoperative, is without any foundation. Full effect can be given to section 56 (1) without construing it as empowering the Board of Revenue to revise certificates made by the Collector under sections 40 and 42 which, as under section 32 occurring in chapter III, operate as a judicial adjudication as to the proper stamp duty, and to undo the action of the Collector resulting from the exercise of his powers under certain other sections in chapters IV and V. Thus, turning for instance to chapter IV, section 39 (1) provides that in the case of a penalty in excess of Rs. 5 which had been levied by a Court under section 38, the Collector may, on application made by the party concerned, refund the amount of penalty in excess of Rs. 5, though the excess also was lawfully levied. Sub-section (2) contains a similar provision for refunding the whole penalty in certain cases. Is it to be supposed that after the Collector has exercised this power and made the refund as therein provided, the Board of Revenue can undo his act? If so, what is

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the law or provision by which the Board of Revenue can recover from the party the amount refunded to him by the Collector? The power conferred by section 39 and in chapter V by sections 49, 52, 53, 54 and 55 may be controlled by the Board of Revenue under section 56 (1) and a reference to these sections will clearly show that the Board can control the Collector's power only before it is actually executed and that in the very nature of things the action resulting from the exercise by the Collector of such power, cannot be undone. Even in respect of documents impounded by the Collector or sent to him by any other officer who has impounded the same, if before the Collector makes the certificate the matter comes to the Board's notice, as it may, at the instance of the party concerned or otherwise, though not on a reference made to it by the Collector under section 56 (2), the Board can, under section 56 (1), control the exercise of the Collector's power in the matter of making a certificate under section 40 or 42 and thus, it will be seen, full effect is given to the phrase "in all cases" occurring in section 56 (1). When the Collector proceeds under section 40 (1) (b), he first makes a requisition for the payment of the duty together with the corresponding penalty and it is only after such payment that he certifies by endorsement under section 42. If the party delays payment there will necessarily be an interval between the impounding or the receipt by the Collector of the instrument and his certifying, and the Board can interpose its control during such interval and in fact it will be perfectly open to the Board under section 56 (1) to require that in all cases in which the Collector may have to proceed under sections 40, 41 and 42, or in regard to particular classes of instruments, the Collector should, before certifying under section 40 or 42, send a return to the Board giving the required particulars which will enable the Board to interpose, if necessary, its control before the Collector makes the certificate. It will be equally open to the Board to require the submission of a similar return in regard to the intended proceedings of a Collector either generally or in special classes of cases under the other sections above referred to, so that the Board may, if necessary, interpose before the Collector has actually exercised his power under those sections. And further until the Collector exercises in favour of the party concerned the various powers conferred on the Collector by the sections above referred to in chapters IV and V, the Board has full scope to interpose its control under section 57 (1) at the instance

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of the party concerned or otherwise and require the Collector to exercise his power as it directs. I think it highly probable that in section 56 (1) the draftsman advisedly qualified the word 'powers' by the adjective 'exercisable,' with a view to denote the intention of the Legislature that the Collector's powers are to be controlled by the Board of Revenue only before they have been actually executed and a right has thereby accrued to a party. It seems to me that if it had been the intention of the Legislature that anything which has been done by the Collector in the exercise of his powers should be subject to revision by the Board of Revenue, the section would have been worded in a different manner, and if that were the intention it is inconceivable that sub-section (2) of section 40 would not have commenced with the words "subject to the provisions of section 56 (1)", and that the same expression would not also have been inserted in sub-section (2) of sections 42 and 44, and it is equally inconceivable that, if the certificate made by the Collector were subject to revision by the Board of Revenue the validity of the Collector's certificate should be affected—as it must be held to be—unlike a certificate made by a civil court under sections 35 and 42, which certificate has been declared erroneous by an Appellate Court under section 61 (2). And it is also unaccountable that in the case of refunds actually made by the Collector under section 39, allowances made by him for spoiled, misused or unrequired stamps under sections 49, 52 or 54, &c, provision would not have been made to enforce repayment of such refunds or allowances or re-delivery of stamps given under section 53, &c., if the Collector's action under those sections is to be set aside on revision by the Board of Revenue

It was urged that the clue to sub-section (1) of section 56—which did not exist in the repealed Act I of 1879—is to be found in the official correspondence which is referred to and partly set forth in the Full Bench decision of this Court in *Referred Case 2 of 1883*(1) and that reading section 56 (1) in the light of that correspondence, the construction contended for is the right one. A reference to section 45 (2)—which did not exist in the repealed Act I of 1879—will clearly show that the above suggestion is entirely unfounded. The power which the Board of Revenue wished to

(1) I.L.R., 7 Mad., 155.

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have in the official correspondence above referred to was conferred on it by the provision contained in section 45 (2) and not by section 56 (1). In the correspondence referred to, the Board considered that the Collector had levied stamp duty in excess of the proper amount and corresponding penalty. The penalty was refunded, but the Board held that it had no power under the law, as it then stood, to refund the stamp duty which had been collected in excess of the proper amount. That power is now expressly conferred by section 45 (2), which would be perfectly superfluous if the construction sought to be placed upon section 56 (1) were the right one and section 45 (1)—which existed in the repealed Act I of 1879—might also well have been dropped in the new Act as superfluous. Section 45 clearly shows that when a Collector has exercised his power under section 40 and levied an amount of penalty and stamp duty in excess of what is legally due, the Board may revise, but only in favour of a private party, his act, and refund the amount of penalty and excess of stamp duty levied and collected by the Collector.

It may be that grammatically the construction contended for is not inadmissible, but grammatically the wording of section 56 (1) is also susceptible of the more limited interpretation, viz., that in all cases, the Board can exercise its control only before the power of the Collector has, by its exercise, been executed and exhausted. [For an instance, see section 15, clause (5) of the Stamp Act X of 1862, where the Board had the power of interposing before the Collector's order, for impressing the document with the stamp as determined by him, was actually carried out.] Even if it is to be construed literally in a comprehensive sense, it is only a general provision, and according to the principle of the canon of interpretation *generalia specialibus non derogant*, it cannot be construed as overriding or limiting the operation of the special provision made as to the conclusive character of a certificate made by the Collector, especially when the general section has its proper operation without thus affecting the special provision.

The conclusion I have come to receives the strongest corroboration from the provisions contained in the previous Stamp Acts, a reference to which places the matter beyond all reasonable doubt. Section 40 of Act XVIII of 1869 ran as follows:—"All certificates and orders of the Collector under this Act shall be open to

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revision on appeal or otherwise, by the Chief Controlling Revenue authority to which the Collector is subordinate. Provided that no order passed on such revision shall invalidate any registration or other proceeding previously made or taken of or upon an instrument endorsed by the Collector under section 24 or 25." Section 24 (d) and section 25, paragraph (2), declared the conclusive character of the Collector's certificate subject to the provision contained in section 40. When this Act was superseded by Act I of 1879, this section (40) was deliberately dropped in its entirety. The consequence was that the Board of Revenue had no power to revise a certificate or order of a Collector and therefore the limitation placed, with reference to the Board's power of revision, upon the clauses declaring the conclusive character of the Collector's certificate was removed. Under Act I of 1879, if the Collector levied excess of stamp duty and corresponding penalty, the Revenue Board had the power under section 42 to refund the penalty but not the excess of stamp duty levied. But, under the present Act, power is conferred by section 45 (2), upon the Board of Revenue, to refund the excess of stamp duty also.

Under Act XVIII of 1869, the Board of Revenue had the power of revising a Collector's certificate, subject however to the express condition that such revision should not invalidate any registration or other proceeding made or taken previous to such order in revision. If section 56 of the present Act is to be construed as contended for on behalf of the Board of Revenue, we have to impute a deliberate intention to the Legislature to revert to the policy of Act XVIII of 1869—which policy was abandoned when Act I of 1879 was passed—and further to revert to that policy without even the safeguard contained in the proviso to section 40 thereof. There is nothing in the present Act which lends any weight to the suggestion that it was the intention of the Legislature to introduce a radical change in the present Act and adopt a retrograde policy and that, too, without the safeguard which existed under Act XVIII of 1869, a safeguard, the absence of which being found to be a defect in the corresponding section 35 of Act X of 1862 was provided in Act XVIII of 1869. If it was the object of the Legislature in enacting sub-section (1) of section 56, in the new Stamp Act, that the power of control thereby conferred on the Board of Revenue should be exercised in respect of orders and certificates made by a Collector, the draftsman would

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surely have adopted and incorporated the language of section 40 of Act XVIII of 1869 with the proviso thereto and inserted the phrase "subject to the provisions of section 56 (1)"—a phraseology that is very common in Indian enactments—in sub-section (2) of sections 40, 42 and 44, as in the corresponding clauses of Act XVIII of 1869

Having regard, therefore, principally to the following, viz., (i) the absence of any provision, in such an elaborate Act as the Stamp Act II of 1899, as to the mode of giving effect to the order of the Board of Revenue in revision, if a certificate made by the Collector or other acts done by him were subject to its control and revision; (ii) the existence of a special provision in section 45 for the Board revising in favour of a private party, and only in favour of a private party, the action of the Collector after his power has been actually exercised, and for giving effect to such order in revision; (iii) the fact that there is nothing in section 56 (1),—which gives the Board a general power of control,—to limit, by necessary implication, the operation of the special clauses of the Act declaring absolutely the conclusive character of a Collector's certificate; (iv) the policy of the Legislature as shown by a comparison of the several successive Stamp Acts in the matter of such certificates being controlled by the Board of Revenue; (v) the Judicial value of a Collector's certificate, as to the validity of instruments; (vi) the fact that the grammatical construction of the section is consistent with the Board's power of control being limited to cases in which the Collector's power has not been actually executed; and (vii) last, though not least, the far-reaching consequences as to the validity of instruments and proceedings had thereon prior to revision—if the same were subject to revision,—in the absence at any rate of a provision corresponding to the proviso to section 40 of Act XVIII of 1869, I find it impossible to persuade myself that the Board of Revenue can revise a Collector's certificate, duly made under section 40 (1) (a), that the instruments in question are not chargeable with stamp duty and can carry out the decision of this Court if it should be held that the said instruments are chargeable with stamp duty.

As I read the reference made to this Court by the Board of Revenue, the object of the Board seems to be rather to obtain an authoritative ruling of this Court for its future guidance in regard to instruments of the class in question and not for the purpose of

revising the Collector's certificate in the present case, applying the decision of this Court to the two instruments in question.

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MOORE, J.—A Sub-Registrar, acting under section 33 of the Stamp Act, impounded two documents on plain paper that had been produced before him for registration and, under section 38, sub-section 2, forwarded them to a Deputy Collector who, however, under section 40, sub-section (1) (a), certified that they were exempt from stamp duty. The Inspector-General of Registration disagreed with the opinion formed by the Deputy Collector regarding the documents and reported the matter for the orders of the Board of Revenue. Under section 57 of the Stamp Act the Board has now referred to the High Court the question as to the stamp duty, if any, chargeable on these documents.

At the hearing of this reference a question has been raised as to whether it was open to the Board of Revenue to make this reference to us and as to whether we have jurisdiction to pass a judgment in the case. An opinion has been expressed to the effect that once a Collector has granted a certificate under section 40, sub-section (1) (a), his decision is final and cannot be set aside or altered by any authority. A Collector granting a certificate acts under powers exercisable by him under chapter IV of the Act; and section 56, sub-section (1), provides that the powers exercisable by a Collector under that chapter shall, in all cases, be subject to the control of the Chief Controlling Revenue authority, *i.e.*, in the Madras Presidency, of the Board of Revenue. It is, however, contended that the wide powers of control given under this sub-section do not authorise the Board to interfere in any way with a case with respect to which a Collector has already granted a certificate under section 40, sub-section (1) (a). This contention appears to me to be a valid one. Section 40, sub-section (2), clearly and distinctly lays down that every certificate under clause (a) of sub-section (1) of that section shall, for the purposes of the Act, be conclusive evidence of the matters stated therein. If it was intended that after a Collector had granted a certificate such grant was liable to be set aside under the powers of control given to the Board by section 56, it is not easy to understand why such a word as 'conclusive' without any qualifying proviso was used in the sub-section. It will be remarked that when a Collector acts under section 40, sub-section (1) (b), and on payment of duty and penalty certifies under section 42 by endorsement

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that the proper duty has been paid, nothing is said as to such certificate being conclusive evidence. The inference to be drawn is, I believe, that the Board can interfere with an order passed under section 40, sub-section (1) (b), even after a certificate has been granted under section 42, but cannot alter in any way an order passed under section 40, sub-section (2), once a certificate has been issued. It is urged here on behalf of the Board that, although the present case is not one which has been, or could be, referred to the Board of Revenue under section 56, sub-section 2, yet, as the Inspector-General of Registration has addressed the Board regarding it, the case may be looked on as one that has 'otherwise' come to the notice of the Chief Controlling Revenue Authority and can therefore be stated to us with the view of obtaining a judgment on it. It appears to me, however, that this argument is not sound. The Board can, no doubt, under section 57 state to the High Court any 'case' that has come to its notice, but by this it must, in my opinion, be held is meant any case that has not been already finally and conclusively determined by the Collector or other competent authority. If, for example, the Collector had, under section 40, sub-section (1) (b), ordered the payment of certain duty on a document, the Inspector-General of Registration could, I consider, if he thought the order was wrong, report the matter to the Board who could state it to the High Court for judgment as being a case not up till then conclusively settled, but once under section 40, sub-section (1) (a), a certificate has been granted there is no case not finally disposed of and there is consequently nothing regarding which the High Court can be asked to pronounce a judgment. I am, for these reasons, of opinion that we must decide that we have no jurisdiction to decide the question referred to us by the Board of Revenue.

Sir ARNOLD WHITE, C.J.—The decision of the Court will be in accordance with the opinion of the majority—that the Court has no power to decide the question which has been referred.

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The effect of section 136 of the Army Act, 1881, as amended by section 4 of the Army (Annual) Act, 1895, is to empower the Civil Courts to attach one moiety of the salary of an officer in the Indian Staff Corps, under section 266, proviso (1), of the Code of Civil Procedure. *Calcutta Trades Association v. Ryland*, (I.L.R., 24 Calo., 102), followed.

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CITY OF MADRAS MUNICIPAL ACT (MADRAS)—ACT I OF 1884, s. 341—

Criminal Procedure Code—Act V of 1898, s. 197—Necessity for sanction to prosecute public servant—Cases in which the fact that accused is a public servant is a necessary element in the offence :

Under section 341 of the City of Madras Municipal Act, any person bringing or causing to be brought timber within the City of Madras without a license, obtained on payment of a fee, is liable to a fine. The Superintendent of the Gun Carriage Factory in Madras, who is an officer holding a commission in the Royal Artillery, brought or caused to be brought timber within the aforesaid limits without license. On a complaint being lodged against him under the section, it was contended that he was a public servant within the meaning of section 197 of the Code of Criminal Procedure and that the Court could not take cognizance of the offence inasmuch as the sanction referred to in section 197 had not been obtained :—*Held*, that sanction was not necessary, as the offence charged was not one which could be committed only by a public servant, nor did it involve as one of its elements that it had been committed by a public servant. *Nando Lal Basak v. Mitter*, (I.L.R., 26 Calc., 852), followed.

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2. _____, s. 341—

Liability of Government under taxing Acts when not expressly mentioned—Prerogatives of the Crown—Indian Councils Act, 1861—24 & 25 Vict., cap. 67, s. 42 :

The Superintendent of the Government Gun Carriage Factory in Madras having brought timber belonging to Government into Madras without taking out a license and paying the license fees prescribed by section 341 of the City of Madras Municipal Act, was prosecuted to conviction by the Municipal Commissioners :—*Held*, on revision, that timber brought into Madras by or on behalf of Government is liable to the duty imposed by section 341 of the City of Madras Municipal Act although Government is not named in the section. According to the uniform course of Indian Legislation, Statutes imposing duties or taxes bind Government unless the very nature of the duty or tax is such as to be inapplicable to Government. *Per curiam* :—Under the Indian Councils Act, 1861, a Provincial Council has, subject to the same restrictions as those imposed by the Act on the Governor-General's Council, power to affect the prerogative of the Crown by Legislation.

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3. _____, ss. 392,

438, 458—Limitation—Continuing nuisance—Opening of burial and burning ground—"Convenient and fitting place"—Smoke from burning ground—Actionable nuisance—Public body—Protection :

By section 392 of the City of Madras Municipal Act, 1884, the Municipal Commissioners "shall provide a sufficient number of convenient and fitting places for burial and burning grounds, either within or without the limits of the city and may acquire land for this purpose ;" and section 458 gives a right of action to any person aggrieved by the failure of the Commissioners to perform a duty imposed on them by the Act,

Plaintiff was the owner of a bungalow, factory and garden in the neighbourhood of Madras. In 1896 the defendants, the Municipal Commissioners for the City of Madras, acquired land close to plaintiff's and opened a burial and burning ground thereon. Plaintiff alleged that his premises had, in consequence thereof, become unhealthy, insanitary, and unfit for residential purposes, that he had been unable to work his factory, and that his property had deteriorated in value. He accordingly sued for an injunction restraining the defendants from using the land acquired by them as a burial and burning ground, and for damages. No negligence was alleged or shown regarding the manner in which the burial ground had been used. There was some evidence that the burning ground was to some extent a source of nuisance to any one who occupied plaintiff's premises, and that the market value of the premises had been depreciated by the opening of the burial ground:—*Held*, that no actionable nuisance had been proved. *Per* Sir ARNOLD WHITE, C.J.—Even if an actionable nuisance had been proved, the defendants were protected. *London and Brighton Railway Co. v. Truman*, (L.R., 11 App. Cas., 45), followed; *Metropolitan Asylum District v. Hill*, (L.R., 6 App. Cas., 193), distinguished. The mere fact that a neighbouring landowner has sustained damage from the establishment of a burning and burial ground does not show that the site selected is not "convenient and fitting." The words "within or without the limits of the City" must be read *secundum subjectam materiam* and with reference to the requirements of the community in connection with the disposal of corpses and the general necessities of the case. By section 433 of the City of Madras Municipal Act, the period of limitation for the commencement of suits against the Commissioners in respect of anything done in pursuance of the powers given by the Act is fixed at six months. *Seem*le, that plaintiff's cause of action, if any, arose when the site began to be used as a burial ground, namely in 1896, and that the claim was barred by limitation, both under section 433 and the general law.

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CIVIL PROCEDURE CODE—ACT XIV OF 1882, ss. 2, 266—*Army Act* (1881)—44 & 45 *Act*, cap. 58, ss. 136, 151—*Army (Annual) Act* (1895)—58 *Act*, cap. 7, s. 4.—"Public officer"—Attachment of moiety of pay of officer of Indian Staff Corps:

The effect of section 136 of the *Army Act*, 1881, as amended by section 4 of the *Army (Annual) Act*, 1895, is to empower the Civil Courts to attach one moiety of the salary of an officer in the Indian Staff Corps, under section 266, proviso (*), of the Code of Civil Procedure. *Calcutta Trades Association v. Ryland*, (I.L.R., 24 Cal., 102), followed.

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2. —, ss. 13, 244—*Res judicata*—*Transfer of Property Act—Act IV of 1882, s. 92—Decree for redemption—Omission to execute—Maintainability of subsequent suit on same mortgage:*

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Vedapurath v. Vallabha Valiyil Raja 300

3. —, s. 30—Leave to sue given after commencement of action—Previous refusal—Validity of suit:

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Chennu Menon v. Krishnan 399

4. _____, s. 43.—*Former suit for injunction to restrain defendants from removing shells stored on certain land—Dismissal as not maintainable—Subsequent conversion by defendants of the shells—Suit for their value—Maintainability—Agricultural tenants—Right to dig shells:*

Though a tenant of lands for the cultivation of paddy may, possibly, be justified in digging up shells from the land for the cultivation of the land in a proper and husband-like manner, the property in the shells so dug up is (in the absence of local custom) not in the tenant but in the landlord, and the tenant has no right to convert them to his use. Defendants, who held land for the cultivation of paddy, had dug up from the land shells which are used for the manufacture of lime, and stored them on the land. The landlords had let the right to dig these shells to plaintiff, who, in conjunction with the landlords, and while the shells were still on the land, sued for a perpetual injunction restraining defendants from digging shells and also to restrain them from carrying away those which they had already dug, and which were stored on the land. That case was dismissed as not being one in which an injunction could be granted. Subsequently to its dismissal, defendants removed the shells, and converted them to their own use. Plaintiff now sued for their value; when it was pleaded that the suit was barred by section 43 of the Code of Civil Procedure:—*Held*, that the suit was not barred.

Chaladom Tholan v. Kakkath Kunhambu ... 669

5. _____, s. 43.—*Omission to include present claim for land in a former suit for other land—Ground of title similar in both suits, but defendants different, and different lands claimed—Maintainability:*

V, who was possessed of different plots of land, namely, lands A and lands B, died, leaving a widow and two daughters him surviving. The widow, who enjoyed all the lands during the remainder of her life, also died. The daughters then attempted to take possession of the lands B from a person who held possession of them, and who wrongfully refused to relinquish that possession. They, as the heirs of their late father thereupon, namely in 1837, instituted a suit and obtained a decree against that person for the recovery of the lands B. In 1896, the daughters attempted to take possession of the lands A, which were in the possession of another person, who also wrongfully refused to relinquish his possession. They thereupon instituted the present suit against that other person, in which they also claimed as the heirs of their late father, to recover possession of the lands A. The persons who had withheld possession of the lands B and A respectively, were different, and the High Court found as a fact that there had been no combination or privity between them in respect of the lands which they had severally withheld. Upon the objection being raised that the present suit was barred, under section 43 of the Code of Civil Procedure, by reason of the fact that the plaintiffs had omitted to include their present claim in the previous suit:—*Held*, that the suit was maintainable.

Dampanaboyina Gangi v. Addala Ramaswami ... 736

6. _____, s. 231—*Limitation Act—Act XV of 1877, ss. 7, 8, sched. II, art. 179—Application for execution of decree—Joint decree in favour of three persons—Previous application more than three years before while one decree-holder was a minor—Attainment of majority by that decree-holder within three years of present application—Limitation—"Joint execution-creditors"—"Joint creditors"—"Person entitled":*

On 30th June 1892, a joint decree was passed in favour of three brothers, who, at the date of the decree, were all minors. On 8th January 1896, the last application for execution previous to the present one was made. At this date two of the brothers had attained majority and one was a minor. On 25th February 1889, the present application for execution was presented; the youngest brother having attained majority less than three years before the application. The application of 8th January 1896 was

decided or assumed to have been made in accordance with law :—*Held*, that the decree was not capable of execution, either as a joint decree, or to the extent of the interest of the youngest decree-holder. Section 7 of the Limitation Act, 1877, only-applies where all the joint execution-creditors were under disability at the time when the period of limitation began to run. Joint execution-creditors are not "joint creditors," within the meaning of section 8 of the Limitation Act, 1877. The words "a person entitled to institute a suit or make an application" in section 7 of the Limitation Act refer to one who, in his own right, is so entitled, and not to a person who, by a rule of procedure, such as that contained in section 231 of the Code of Civil Procedure, is authorised, with the permission of the Court, to make an application for execution for the benefit of himself and others interested jointly with him in the decree to be executed. *Surja Kumar Dutt v. Arun Chunder Roy*, (I.L.R., 28 Calc., 465), dissented from; *Seshan v. Rajagopala*, (I.L.R., 13 Mad., 236), and *Vigneswara v. Bapayya*, (I.L.R., 16 Mad., 436), approved.

Periasami v. Krishna Ayyan 431

7. —————, s. 232—Order refusing to recognize transferee of decree—Appeal:

An order passed under section 232 of the Civil Procedure Code refusing to recognize the transferee of a decree, may, for purposes of appeal, be regarded as an order passed under section 244 and is therefore appealable. *Virasami Rowth v. Bodi Naikan* (Appeal against Appellate Order No. 60 of 1899 (unreported)), followed.

Subbuthayammal v. Chidambaram Asari 383

8. —————, s. 244—Determination of question whether party applying for execution is representative of decree-holder—Appeal:

The effect of the last clause of section 244 of the Code of Civil Procedure is to give the right of appeal against an order determining whether a party applying for execution is or is not the representative of the decree-holder.

Krishnama Chariar v. Appasami Mudaliar 545

9. —————, s. 244—Execution of decree passed on usufructuary mortgage—Continuation of possession by mortgagee subsequently to decree—Claim to set off profits thus accrued from decree amount—Application for order absolute—Transfer of Property Act—Act IV of 1882, s. 89:

By a decree passed on a compromise in a suit for the amount due under a mortgage, defendants were ordered to pay Rs. 770 to plaintiffs within a year, and in default of payment the amount was to be recovered by sale of the mortgaged and other property. By the terms of the mortgage, possession was given in lieu of interest, but the decree was silent as to possession and interest. Upon an application being made for execution of the decree by sale of the property referred to in it, the District Judge held that if the petitioners had continued in possession of the mortgaged property ever since the date of the decree, it would be necessary to take an account to ascertain whether the decree had been satisfied, and dismissed the petition :—*Held*, that such an order was wrong, inasmuch as it went behind the decree instead of executing it. *Held also*, that the application, in which the decree-holder stated that there had been default in payment of the decree amount and applied for sale, was an application for an order absolute for sale.

Appa Rao v. Krishna Ayyangar 537

10. —————, s. 244—Purchase of mortgaged property by mortgagee—Application by purchaser to recover possession as against defendants who held possession under prior sale based on prior mortgage—Question raised whether purchaser could recover possession without first paying defendants amount of prior mortgage—"Execution and enforcement of decree"—Appeal:

A mortgagee obtained a decree directing the sale of property in the possession of certain defendants, subject to a prior charge thereon. At the sale in execution of that decree, the mortgagee purchased the

property. He now sought to recover possession of it from the defendants, the question raised being, whether, under the terms of the decree, he was entitled to be put into possession without paying the amount of the prior charge, the defendants so dispossessed being at liberty to bring a separate suit to enforce the charge :—*Held*, that the question thus raised between the decree-holder (purchaser) and the defendants related, within the meaning of section 244 (c) of the Civil Procedure Code, to the execution or enforcement of the decree against these defendants and an appeal lay from an order passed thereon. *Per* MOORE, J.—Even if the purchaser had not been also the decree-holder he would have been a representative of a judgment-creditor. *Per* BHASHYAM AYYANGAR, J.—The order was not the less an order under section 244, because it was also passed under sections 318 and 334 of the Code.

Kasinatha Ayyar v. Uthumansa Rowthian 529

11. —————, ss. 244, 310-A, 311, 540—*Sale of mortgaged property in execution of mortgage-decree—Proceeding in execution :*

Sections 310-A and 311 of the Code of Civil Procedure apply to sales of mortgaged property in execution of mortgage decrees. *Kedar Nath Raut v. Kali Churn Ram*, (I.L.R., 25 Calc., 703), commented on. *Tirumal Rao v. Syed Dastaghir Misyah*, (I.L.R., 22 Mad., 286), *Raja Ram Singh v. Churn Lal*, (I.L.R., 19 All., 205), and *Krishnay v. Mahadev Vinayak*, (I.L.R., 25 Bom., 104), approved. An appeal lies from an order passed upon an application made under section 89 of the Transfer of Property Act. *Per* SIR ARNOLD WHITF, C.J., and MOORE, J.—Such an order is not an order made in a proceeding in execution and is not appealable as such. It, however, has the effect of a final decree, and an appeal lies therefrom under section 540 of the Code of Civil Procedure. *Per* DAVIES, BRISON and BHASHYAM AYYANGAR, JJ.—An application made under section 89 of the Transfer of Property Act is, in effect, an application for execution of the decree passed under section 88, and an order made thereon is appealable under section 244 of the Code of the Civil Procedure. *Ajudhia Pershad v. Baldeo Singh*, (I.L.R., 21 Calc., 815), and *Tara Prasad Roy v. Bhobodeb Roy*, (I.L.R., 22 Calc., 931), discussed.

Mallikarjunadu Setti v. Lingamurti Pantulu 244

12. —————, ss. 278, 279, 288—*Claim petition—“Some interest” in property attached—Order dismissing claim by mortgagors—Letters Patent, art. 15—“Judgment”—Appeal :*

An order passed by a Judge sitting on the Original Side of the High Court dismissing a claim preferred under sections 278 and 282 of the Code of Civil Procedure by the mortgagors of immoveable property which has been attached in execution of a decree, is subject to appeal. Article 15 of the Letters Patent is not restricted by sections 588 and 591 of the Code of Civil Procedure. Four persons lent money on mortgage, the deed, with the consent of all, being prepared in favour of one of them alone. It however specified the amount that each had advanced and provided that if the nominal mortgagee should receive any instalments from the mortgagors, the same should be distributed between all the four mortgagees according to the amounts advanced by them. The nominal mortgagee died, leaving a will appointing executors, who had not, however, taken out probate. A judgment-creditor of the mortgagors then caused the property to be attached, whereupon the three other creditors filed a claim petition asking that the attachment might be declared to be subject to the mortgage—*Held*, that the applicants were competent to prefer the claim and establish, within the meaning of section 279 of the Code, “some interest in” the property attached. If the nominal mortgagee was the agent of the applicants, they had a legal interest in the property attached, and if he was a trustee, they had a beneficial or equitable interest therein. A beneficial interest is as much an interest within the meaning of section 279, as a legal interest in the property attached.

Sabhapathi Chetti v. Narayanasami Chetti 555

13. _____, s. 283—"Party against whom
an order has been made".

Plaintiff sued to recover possession of immoveable property. The land in question had, on a previous occasion, been attached in execution of a decree against plaintiff, whereupon his younger brother, the present second defendant, had preferred a claim-petition, on which an order was passed holding that plaintiff (then judgment-debtor) and second defendant (then claimant) were jointly entitled to the land. The claim was held to be good to the extent of a moiety of the land, which was accordingly released from attachment, the other moiety being ordered to be sold, the claimant's claim thereto being rejected. Plaintiff satisfied the decree and the property was not sold. He now sued to recover possession of it—*Held*, that, having regard to the terms of the order in the claim proceedings and to the fact that it had not been proved that plaintiff had actually received notice of them, plaintiff was not a party against whom an order had been made, within the meaning of section 283 of the Code of Civil Procedure, and that the order was not conclusive as against him. *Nettontom Perengayyom v. Tayanbary Parameshuaren Nambudri* (4 M. H.C.R. 472) doubted.

Moidin Kutti v. Kunhi Kutti Ali 721

14. _____, s. 307—Default of purchaser
at Court-sale to pay full amount—Forfeiture

Section 307 of the Code of Civil Procedure is imperative and must be given effect to. Where a purchaser at a Court-sale makes default in paying the full amount of the purchase money, the deposit must be forfeited. The fact that the decree holder and the judgment-debtor do not ask for a resale, but consent to the original sale being allowed to stand, is no reason why the Government should forego the forfeiture.

Sambasiva Ayyar v. Vydinathasami 535

15. _____, ss. 336, 344—Arrest of judgment-
debtor—Petition under s. 336—Release on furnishing security to apply to be
declared insolvent within a month—Failure to apply within that time—
Subsequent application under s. 344—Maintainability:

A judgment-debtor who had been arrested, was released under section 336 of the Code of Civil Procedure on furnishing security that he would, within one month, apply to be declared an insolvent. The month passed and he failed to make the application. He was not arrested again, and, at a subsequent date, applied under section 344 to be declared an insolvent:—*Held*, that he was entitled to do so.

Alagappa Chetti v. Sarathambal 724

16. _____, s. 372—Letters Patent, art.
15—"Judgment"—Appeal—Insolvent Debtors' Act—11 & 12 Vict., cap. 21, s.
23—Reputed ownership—Charge on debts—Devolution of interest of judgment-
debtor upon Official Assignee:

An order dismissing an application by a judgment-creditor of an insolvent for a sum of money in the hands of the Official Assignee to be paid by the Official Assignee to the judgment-creditor, is a "judgment" within the meaning of article 15 of the Letters Patent, and an appeal lies therefrom. In March 1897, B covenanted to repay by instalments a sum of money owing by him to plaintiff, and mortgaged his stock-in-trade and all outstandings and moneys then due and owing and thereafter to become due and payable to him. B remained in possession. In July 1899 plaintiff sued B on the mortgage-deed. In August 1899, upon an *ex parte* application by the plaintiff, an order by way of injunction was made in the suit restraining the mortgagor from disposing of the stock-in-trade and outstandings and debts payable to him. This injunction was subsequently dissolved. In the same month plaintiff gave notice to a person indebted to B that plaintiff claimed the amount of the debt under his mortgage. In September 1899 B was adjudged an insolvent and the usual vesting order was made. In October 1899, plaintiff obtained a

decree in his suit, by which it was ordered that B should pay the principal and interest due under the mortgage-deed and that in default of payment the mortgaged premises should be sold. In February, 1900 the person indebted to B paid the amount of his debt to the Official Assignee. In September 1900, an order was made in plaintiff's suit against the insolvent directing that the decree should be executed by the attachment of the money in the hands of the Official Assignee. In December 1900, plaintiff applied by summons in his suit against the insolvent for an order that the Official Assignee should pay over that money:—*Held*, that plaintiff was not entitled to the order. The decree, as a mortgage decree directing the sale of the chattels, including the debt in question, was void and inoperative as against the Official Assignee inasmuch as the whole right, title and interest of the defendant devolved by operation of law upon the Official Assignee during the pendency of the suit and before the decree had been passed. Nor was the position of the Official Assignee affected by the doctrine of *lis pendens*. The party seeking to bind him by the result of the suit (pending which the interest in its subject-matter had devolved upon the Official Assignee by operation of law) should have applied under section 372 of the Code of Civil Procedure to have him joined as a party to the suit. *Miller v. Budh Singh Dudhuria*, (I.L.R., 18 Cal., 43), referred to. Where a debtor has assigned a debt, notice by the assignee to the person owing the debt will take it out of the order or disposition of the debtor. *Per* Sir ARNOLD WHITE, C.J.—A chose in action, if it is a debt due to the insolvent in his trade or business, comes within the words "goods and chattels" as contained in section 23 of the Indian Insolvent Debtors' Act. *Per* BHASHYAM AYYANGAR, J.—The instrument only created a charge or hypothecation in plaintiff's favour, but a charge-holder is as much the substantial owner of and has as substantial an interest in the goods and chattels as a mortgagee thereof, and if either allows the mortgagor or the person creating the charge to remain in possession, under circumstances which will lead to his being the reputed owner and to his being enabled to command credit thereby, he will be estopped from asserting his substantial interest or ownership in the property as against the Official Assignee. A debt is taken out of the order and disposition of an insolvent if a suit be brought to enforce a charge upon the debt prior to his adjudication.

Puninthavelu Mudaliyar v. Bhashyam Ayyangar " 406

17. _____, s. 411—Court fees—First charge on subject-matter of suit—Purchase of portion of subject-matter at sale to recover Court fees—Subsequent purchase in execution under another decree—Validity :

A suit was filed in *forma pauperis* and a decree passed, in December 1898, awarding the plaintiff therein certain land. A portion of that land was, in 1896, put up for sale in order to recover the amount due to Government as stamp fees in connection with the pauper suit, and the present plaintiff bought it. The same land was attached, in 1899, in execution of another decree, which was passed in March 1894. Plaintiff made a claim, which was rejected, and the land was sold to the second defendant, in execution of that other decree, in September 1899. Plaintiff now sued for a declaration that the land was not liable to be sold in satisfaction of the other decree —*Held*, that inasmuch as the amount of the stamp fees recoverable by Government in connection with the pauper suit was a first charge on the property, under section 411 of the Code of Civil Procedure, the purchase by plaintiff prevailed as against the purchase by the second defendant.

Puthia Valappil Barga v. Veloth Assennar " 733

18. _____, s. 575—Letters Patent, Art. 15—"Judgment"—Revision petition against decree in small cause suit—Difference of opinion—Appeal—Contract Act—Act IX of 1872, s. 72—Right to recover money had and received to plaintiff's use unaffected by section 72 :

The plaintiff in a small cause suit having obtained a decree, the defendant filed a civil revision petition in the High Court. At the hearing by a Bench, one learned Judge expressed the opinion that the case should be remanded for disposal according to law after further evidence had

been taken, whilst the other held that the case was not one with which the High Court should interfere. The defendant then preferred an appeal under article 15 of the Letters Patent, when a preliminary objection was taken to the hearing of the appeal, on the ground that there had been no judgment within the meaning of the article:—*Held*, that the adjudication by the Bench was a judgment within the meaning of article 15 of the Letters Patent. *Held also*, that the case was governed by section 575 of the Code of Civil Procedure, and not by article 36 of the Letters Patent. Defendant had sought to exercise, as against plaintiff, the special powers conferred upon landholders by section 38 of the Rent Recovery Act. In fact, the relations between defendant and plaintiff were not such as entitled defendant to exercise those powers. Plaintiff, in order to avert the injury which he would have sustained if his interest in the land had been sold, paid the amount demanded by the defendant, and now sued to recover from the defendant the sum so paid:—*Held*, that plaintiff was entitled to recover the money paid by him as money had and received by defendant to the use of the plaintiff. Section 72 of the Contract Act in no way affects the principle of law that where a defendant has received money which in justice and equity belongs to a plaintiff, under circumstances which render a receipt of it a receipt by the defendant to the use of the plaintiff the plaintiff is entitled to recover. *Jugdeo Narain Singh v. Raja Singh*, (I.L.R., 15 Cal., 656), approved.

Narayanasami Reddi v. Osuru Reddi 548

19. —————, s. 586—*Provincial Small Cause Courts Act—Act IX of 1887, s. 15, sched. II, cl. 35 (j)—Compensation for illegal distress—Second appeal—Limitation—Rent Recovery Act (Madras)—Act VIII of 1865, s. 78—Cause of action complete on date of illegal distress*

A plaint alleged that plaintiffs had for long cultivated certain land as tenants under defendant, that they had raised a crop of paddy measuring about 6 garces and stored it in three heaps on the land, that one of the plaintiffs had paid all the dist that was due to defendant, but that defendant had taken unlawful possession of two of the heaps of paddy measuring about 5 garces under the pretext that he had distrained them. The prayer was for an order directing defendant to deliver to plaintiffs about 5 garces of grain worth Rs. 250 at Rs. 50 per garce in respect of the two heaps of paddy of which he had taken unlawful possession. The distraint was made on 25th January 1898, and the suit was instituted on 26th July of the same year:—*Held*, that the suit was in substance one for compensation for illegal distress or attachment and not for the recovery of specific property, and that, in consequence, it was not a suit of the nature cognizable by a Court of Small Causes, and a second appeal lay. *Held also*, that the suit was barred. The wrong was complete and the cause of action arose when the unlawful distress was made. *Yamuna Bai Rani Sahiba v. Solayya Kavundam*, (I.L.R., 24 Mad., 339), distinguished.

Pamu Sanyasi v. Zemindar of Jayapur 540

20. —————, s. 596—*Appeal to Privy Council—Concurrent decisions on facts—Leave granted when no substantial question of law was involved*

Where, on an appeal to the Privy Council there were two concurrent decisions of the Courts below on facts sufficient to dispose of the suit, but the High Court had granted leave to appeal stating that "there seems to be a point of law which however has not been argued here, and it is therefore hereby certified that, as regards the subject-matter, and the nature of the questions involved, the case fulfils the requirements of section 596 of the Civil Procedure Code," the Judicial Committee held, it appearing that there was no substantial question of law involved, that there was no sufficient ground for the leave to appeal, which ought not to have been granted.

Karuppanan Servai v. Brinivasan Chetti 515

COMPANIES ACT—ACT VI OF 1882, s. 169—*Appeal from order in winding up—Ex parte application for extension of time—Service of notice within the extended time—Validity of extension made on ex parte application—Right of respondents to raise objections at hearing of appeal:*

By section 169 of the Indian Companies Act, 1882, appeals are provided for against orders and decisions made in the winding up of companies, subject to the restriction that no such appeal shall be heard "unless notice of the same is given within three weeks after any order complained of has been made in manner in which notices of appeal are ordinarily given under the Code of Civil Procedure, unless such time is extended by the Court of appeal." Certain applicants, under section 214, for an order against delinquent directors and officers of a company, appealed to the High Court against the order of a District Judge dismissing their petitions. An *ex parte* application was made by them under section 169, for an extension of time during which notice of the appeal might be given, an order for extension was made, and notice was in fact given to the respondents within the time so extended. Upon the appeal coming on for hearing it was objected that the time should not have been extended without notice to the respondents, and that the extension, if granted, should be subject to objection being raised at the hearing.—*Held*, that notice of the application for extension of time was unnecessary; but, inasmuch as the order granting an extension had been made *ex parte*, the respondents were entitled to raise objection to it at the hearing. Such an appeal must, under section 169, be filed within three weeks of the date of the order, at the latest. *Per* BHASHYAM AYYANGAR, J.—While refraining from expressing an opinion on the point, the terms of section 169 of the Companies Act are probably complied with by lodging the memorandum of appeal.

Lakshminarasayya Setti v. Venkanna Setti 576

CONTRACT ACT AMENDMENT ACT—ACT VI OF 1899, s. 4—*See CONTRACT ACT.*

CONTRACT ACT—ACT IX OF 1872, ss. 20, 30, 65—*Advance on risk (yogyam) of ship—Marine Insurance—Contract by way of wager:*

In a document, dated 3rd August 1896, signed by defendants and addressed to plaintiff, it was recited that plaintiff had lent a sum of money to defendants on the risk or security ("yogyam") of a ship belonging to defendants "now under sail to the Nicobars" from Negapatam; and the defendants stipulated that "as soon as the said ship starts for and reaches the Nicobar Isles and thence sets sail and goes to Rangoon, Moulmein and from there starts again and reaches Negapatam that is, as soon as the said ship shall come back to the Negapatam harbour again, we shall repay to you on the expiry of eight months from 23rd July 1896" the sum advanced with interest. The ship had left Negapatam on 23rd July 1896 and was lost at sea three days later. Plaintiff sued defendants for the sum advanced, on the ground, among others, that as the vessel had been lost before the date of the agreement, the latter was void, and the defendants were liable to refund the amount advanced.—*Held*, that he was not entitled to recover. The risk which formed the basis of the agreement, according to its true construction, commenced from 23rd July 1896, as set out in the document, because it was on that day that the vessel sailed from port and commenced to incur the perils of the deep. The agreement was consequently not void under section 20 of the Contract Act, nor were the defendants bound, under section 65 of that Act, to restore to plaintiff the sum they had received under its terms. Such an agreement could not be held to be in any sense a policy of marine insurance. *Per* DAVIES, J.—The suit should be dismissed, under section 30 of the Contract Act, on the further ground that the agreement was one by way of wager.

Vappakandee Marakayar v. Annamalai Chetti 561

2. _____, s. 45—*Right of succession by legal representative—Aliyasantana law—Fund settled on marriage of husband and wife—Interest payable to both jointly—Death of husband—Claim by widow by right of survivorship—Right of husband's legal representative to his share.*

Upon the marriage of first defendant with K, a sum of money was settled by first defendant's mother, on first defendant or on K. This money was lent on mortgage, and by the terms of the mortgage, interest was payable by the mortgagors to first defendant and to her husband K, jointly, with the exception of that which would accrue in respect of the last year of the term, which, together with the principal sum secured by the mortgage, was to be paid to first defendant herself. K died, whereupon plaintiff, as K's legal representative, brought the present suit to recover the interest due under the mortgage:—*Held*, that plaintiff was entitled, under section 45 of the Contract Act, as the legal representative of K, to a moiety of the interest which had accrued since the death of K, first defendant being entitled to the other moiety, and that the right to the whole of the interest did not pass by survivorship to first defendant. The circumstance that K and first defendant intended to live and did in fact live together as husband and wife under the Aliyasantana law was insufficient to raise the presumption of a contract that there was to be a right of succession by survivorship between K and first defendant in respect of the settled fund.

Kanthu Punja v. Vittamma 385

3. _____, s. 65—*Insurance—Policy of Life Insurance—Waranty—Age of assured—Mis-statement of age—Onus of proof—Return of premium paid on policy subsequently held void—Evidence Act—Act I of 1872, s. 32 (5)—Statement as to age of a member of a family by another member since deceased—Admissibility:*

In August 1898, V signed a proposal form addressed to the defendant company for a policy of insurance for a sum of money payable at his death. In it V gave the date of his birth as corresponding to 7th August 1840, and stated that he would be fifty-eight next birth-day and declared that the particulars given therein were correct. On or about the same date V also signed a "personal statement," which, after answering numerous questions, concluded with the following declaration—"I . . . do solemnly declare that according to the best of my knowledge and belief I am now in good health . . . and that my age does not exceed fifty-eight years . . . and that I have fully and faithfully answered all such questions as have been put to me in the form of proposal and by the medical referee relative to my habits, constitution and general state of health without concealment or reservation of any kind, . . . and I hereby covenant and agree that this declaration shall be the basis of the contract between myself and the company, and if any untrue averment be contained herein or if any of the facts required to be set forth in the proposal and in the medical examination be not truly stated, all moneys which shall have been paid upon account of the assurance made in consequence hereof shall be forfeited and the assurance itself be absolutely null and void." In September 1898, the defendant company issued a policy for the sum proposed for, which recited that V had delivered a statement in writing declaring, *inter alia*, that his age on his next birth-day would not exceed fifty-eight years, and contained the proviso that the policy was issued upon the express condition that in case any statement or allegation contained in that declaration should be untrue, or if the assurance thereby made should have been made through any misrepresentation or concealment, the policy should be void. In September 1899 V died, and plaintiff, his nephew, claimed from defendants the amount due under the policy. Defendants refused to pay on the ground, *inter alia*, that the policy had been obtained by fraudulent misrepresentations as to the age, means and circumstances of the assured. The evidence showed that the age of the assured was from three to four years greater than he had declared it to be:—*Held*, that the defendants were not liable on the policy. *Held also*, that the plaintiff was not entitled, under section 65 of the Contract Act, to a refund of premia paid on the policy during the

lifetime of the assured. In the "personal statement" referred to the assured had omitted to disclose the fact that two sisters had predeceased him. In reply to a question as to whether any brother or sister had died, and if so of what diseases and at what ages the assured had stated that a brother had died at the age of seventy-seven years. It now appeared that two sisters had also died at a date previous to that of the statement. *Held*, that the policy was not rendered void by this omission. *Per* Sir ARNOLD WHITE, C.J.—The declaration contained in the "personal statement" being ambiguous should be construed in favour of the assured, and amounted only to a warranty that the age of the assured was fifty-eight to the best of his knowledge and belief; but this statement of age by the assured was, in fact, an untrue statement and untrue to his knowledge and belief. The statement was in the nature of a warranty and formed part of the contract, and in consequence plaintiff was not entitled to recover on the policy. *Per* BHASHYAM AYYANGAR, J.—The assured had given a warranty which, in a case of insurance, operated as a condition precedent to the attaching of any risk under the policy, that every statement and allegation contained in the declaration was substantially and in fact true, and the question for the Court to consider was, not the materiality or otherwise of that statement, but its truth. The clause in the personal statement relating to the "knowledge and belief" of the assured did not qualify the warranty there given; there was no real ambiguity, and, in consequence, the warranty as to age was an absolute one and not merely a warranty of his belief as to his age. *Also*, that a statement as to plaintiff's age, made by his sister, was admissible in evidence after her decease, under section 32 (5) of the Evidence Act, the date of birth being the commencement of a relationship by blood, and therefore relating to the existence of such relationship within the meaning of the section. *Ram Chandra Dutt v. Jageswar Naram Deo*, (I.L.R., 20 Cal., 758), followed. The defendant company's prospectus contained a condition that evidence of age of an assured would be required to be furnished in every case before a claim under a policy would be paid; and recommended assurers to provide evidence of age as soon as possible as it was required on settlement of claim if not previously produced. *Semble*, that the effect of the condition was to throw upon the assured or his representatives the onus of proving the correctness of the age as warranted by the assured. *Also*, that it was unnecessary to prove that the company's prospectus had been read by or specially brought to the notice of the assured, apart from the reference made to it in the policy (which was expressed to be issued subject to the regulations and conditions comprised in the prospectus). *Watkins v. Rymil*, (L.R., 10 Q.B.D., 178), followed. *The Oriental Government Security Life Assurance Company, Limited v. Sarat Chandra Chatterji*, (I.L.R., 20 Bom., 99), referred to.

Oriental Government Security Life Assurance Company, Limited v. Narasimha Chari 183

4. —, s. 72—*Letters Patent, Art. 15*—"Judgment"—*Revision petition against decree in Small Cause suit—Difference of opinion—Appeal—Civil Procedure Code—Act XIV of 1882, s. 575—Right to recover money had and received to plaintiff's use unaffected by section 72.*

The plaintiff in a small cause suit having obtained a decree, the defendant filed a civil revision petition in the High Court. At the hearing by a Bench, one learned Judge expressed the opinion that the case should be remanded for disposal according to law after further evidence had been taken, whilst the other held that the case was not one with which the High Court should interfere. The defendant then preferred an appeal under article 15 of the Letters Patent, when a preliminary objection was taken to the hearing of the appeal, on the ground that there had been no judgment within the meaning of the article:—*Held*, that the adjudication by the Bench was a judgment within the meaning of article 15 of the Letters Patent. *Held also*, that the case was governed by section 575 of the Code of Civil Procedure, and not by article 36 of the Letters Patent. Defendant had sought to exercise, as against plaintiff, the special powers conferred upon landholders by section 38 of the Rent Recovery Act. In

fact, the relations between defendant and plaintiff were not such as entitled defendant to exercise those powers. Plaintiff, in order to avert the injury which he would have sustained if his interest in the land had been sold, paid the amount demanded by the defendant, and now sued to recover from the defendant the sum so paid. *Held*, that plaintiff was entitled to recover the money paid by him as money had and received by defendant to the use of the plaintiff. Section 72 of the Contract Act in no way affects the principle of law that where a defendant has received money which in justice and equity belongs to a plaintiff, under circumstances which render a receipt of it a receipt by the defendant to the use of the plaintiff, the plaintiff is entitled to recover. *Jugdeo Narain Singh v. Raja Singh*, (I.L.R., 15 Cal., 656), approved.

Narayanasami Reddi v. Osuru Reddi ... 548

5. ———, s. 74—*Usury Laws Repeal Act—Act XXVIII of 1855, s. 2—Contract Act Amendment Act—Act VI of 1899, s. 4—Penalty—Principal sum bearing no interest repayable by instalments—Provision for interest in case of default:*

Defendant was indebted to plaintiff, as the stakeholder of a "chit fund," and undertook to pay the amount of the principal by half-yearly instalments. He further undertook that, in case of default in the payment of such instalments, he would pay interest at the rate of one pie per rupee per diem from the date of default. No interest was payable on the principal sum unless default should be made, the instalments being in repayment of the principal sum alone without interest. Default having been made, plaintiff sued on the bond, whereupon defendant pleaded that the rate of interest was penal and not recoverable.—*Held*, that plaintiff was entitled to recover. The contract was not one which provided for the payment of a given rate of interest in any event and a higher rate in case of default. Under the agreement the debtor incurred no obligation to pay interest at all on the money which he owed. His liability to pay interest only arose in the event of default. The case was not governed, therefore, by the Contract Act of 1872, or the Contract Act Amendment Act of 1899. *Per Sir ARNOLD WHITE, C.J.*—Under the Contract Act of 1872, a stipulation that an enhanced rate of interest should be payable as from the date of default is not a stipulation by way of penalty. The explanation to section 4 of the Contract Act of 1899, which provides that a Court may treat such a stipulation as a penalty, is permissive and does not preclude it from holding otherwise. *Semble*, that the words "which is put in issue" in section 4 of the Contract Act of 1899, mean "which is in issue" and that where there is an appeal from a decree in a suit instituted in respect of a contract the contract is "in issue" in the appeal. Also, that the Contract Act of 1899 only applies to suits instituted after the commencement of that Act.

Sankaranarayana Vadhyar v. Sankaranarayana Ayyar ... 343

6. ———, ss. 239, 253—*Hindu Law—Mitakshara doctrine of joint family property—Limitation Act—Act XV of 1877, sched. II, art. 106—Partnership:*

V and his five sons constituted an undivided Hindu family. V and his three elder sons lived apart from the two younger sons and were in possession of some ancestral property. The two younger sons were plaintiff and first defendant respectively in this suit. Plaintiff sued this brother for an account and for partition of certain property which he alleged to be the property of a joint family consisting of the first defendant and himself. The property had, as plaintiff alleged, been acquired from the funds of a business which had been carried on jointly by him and first defendant until 1894, and continued by the first defendant until the institution of the suit. It was alleged that although there had not been an express agreement of partnership, in the circumstances of the case an agreement under which plaintiff had become jointly interested in the business ought to be inferred.—*Held*, that plaintiff had not a joint interest in the contract business and was not entitled to claim a share in it. *Held also*, that even if such an interest had existed plaintiff's claim was barred by limitation. *Moung Tha Hnyin v. Mah Them Myah*, (L.R.,

27 I.A., 189; I.L.R., 28 Calc., 53), distinguished. *Per* BHASHYAM AYYANGAR, J.—It was impossible to regard plaintiff and first defendant as forming in themselves an undivided family owning joint family property as a corporate body. *Sham Narain v. Court of Wards*, (20 W.R., (C.R.), 197), commented on. The origin and nature of the Mitakshara doctrine of joint family property discussed. *Peddappa v. Ramalingam*, (I.L.R., 11 Mad., 406), referred to. *Radha Churn Dass v. Kripa Sindhu Dass*, (I.L.R., 5 Calc., 474 at p. 477), considered. *Rampershad Tewarry v. Sheochurn Doss*, (10 M.I.A., 490), distinguished.

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CONTRIBUTION AS BETWEEN JUDGMENT-DEBTORS—*Decree against two defendants jointly—Satisfaction by one alone—Prima facie case made by production of judgment and certificate of satisfaction—Joint tort-feasors:*

Where the amount of a decree has been recovered from one of two judgment-debtors against whom it was jointly passed and he sues the other judgment-debtor for contribution, a *prima facie* case is made by the production of the judgment and the certificate of satisfaction. That judgment is conclusive as between the judgment-debtors in the sense that it will not be open to either of them to contend that the former suit should have been dismissed, or that one of the parties should not have been held liable to the decree-holder therein, or that the amount decreed was excessive or based on principles erroneous on the face of the judgment. But it will be open to the party from whom contribution is sought, without impugning the propriety of the judgment, to plead and establish that as between the joint debtors the plaintiff is solely liable for the debt or that the defendant is not equally liable with the plaintiff, or that the suit is not maintainable by reason of the fact that the plaintiff and the defendant are joint tort-feasors in a sense in which, on public grounds, the right to claim contribution is negatived. And though it may have been rightly held in the former suit that both judgment-debtors were jointly liable for the mesne profits of land for three years, it will still be open to the defendant in the suit for contribution to show that the plaintiff alone enjoyed those profits: and in that case the plaintiff will not be entitled to contribution. Whether the principle laid down in *Merryweather v. Naxon* (8 T.R., 186) should be followed in India.—*Quære*.

Siva Panda v. Jujutsu Panda 599

COURT FEES ACT—ACT VII OF 1870, ss. 4, 16—*Stamp duty on memorandum of objections—When payable:*

Stamp duty on a memorandum of objections filed by a respondent in an appeal, under section 561 of the Code of Civil Procedure, need not, under section 16 of the Court Fees Act, be paid till the time of hearing.

Reference under Court Fees Act, s. 5 24

2. —————, s. 8—*Valuation of suit—Suit for an account—Petition to increase valuation after pnding by Commissioner—Increase to amount exceeding Court's jurisdiction—Return of plaint for presentation to proper Court—Material irregularity:*

In a suit for an account the usual valuation for purposes of Court Fees was made in the plaint, which was filed and received in a Munsif's Court. The Munsif appointed a Commissioner to take an account and the result was that plaintiff was found by the Commissioner to be entitled to a much larger sum. Plaintiff then applied for leave to amend the plaint, which was granted, and the valuation of the suit was accordingly increased. As the amount claimed in the amended plaint was greater than that over which the Court of a Munsif ordinarily has jurisdiction, the Munsif ordered the plaint to be returned for presentation to the proper Court:—*Held*, that the Munsif had acted with material irregularity in permitting the valuation of the suit to be revised; and that he ought to have tried the case.

Arogya Udayan v. Appachi Rowthan 548

3. _____, s. 28—*Insufficient duty on plaint and on memorandum of appeal—Order by High Court on second appeal for payment of the duty properly payable—Civil Procedure Code—Act XIV of 1882, s. 582A—Retrospective validation of defective memorandum of appeal—Effect of this section on defective plaint:*

In a suit for the cancellation of a sale-deed executed by plaintiff to defendant for Rs. 2,500, stamp duty of Rs. 10 was paid on the plaint. The suit was dismissed by the District Munsif and plaintiff appealed to the District Court, paying a similar duty on his memorandum of appeal. The District Court dismissed the appeal, whereupon plaintiff filed a second appeal, paying stamp duty thereon Rs. 150. On objection being taken in the High Court that the second appeal could not be entertained because of the insufficient payment of stamp duty in the lower Courts, the High Court held that the proper Court fee payable on the plaint and on the memorandum of appeal was Rs. 150, and ordered, under section 28 of the Court Fees Act, that such fees be paid within twenty-one days. The duty having been paid in due course, the High Court considered and decided the second appeal on its merits.

Valambal Ammal v. Vylathilinga Mudaliar 380

4. _____, sched. 1, item 11—*Will by husband conferring general power of appointment over a fund on his wife—Payment of probate duty on the fund on the husband's decease—Exercise of the power by the wife by will—Decease of wife—Liability of her estate for probate duty in respect of the power—"Property":*

By his will, A directed that Rs. 7,000 out of his property should be lent out at interest, that the interest derived from time to time should be added to the principal amount, and that the amount so accruing should be paid to whoever B, his wife, by her will, should appoint. A died and his will was proved, probate duty being paid on the principal amount of Rs. 7,000. B executed a will in which she exercised the power of appointment and also died. Her executor now applied for probate of her will, and the question was raised whether he was liable to pay probate duty on the fund or any part thereof.—*Held*, that the power of appointment created by the will was property, within the meaning of section 11 of the Court Fees Act and the estate of the testatrix was liable to probate duty in respect thereof. *In the goods of George*, (6 B.L.R., Appx., 188), commented on.

In re Lakshminarayana Ammal 515

CRIMINAL PROCEDURE CODE—ACT V OF 1898, s. 195 (4)—Sanction to prosecute:

Clause (4) of section 195 of the Code of Criminal Procedure applies only to cases in which, at the time of granting sanction to prosecute, the offender is uncertain or unknown. Where there is no doubt as to whom the prosecution is to be directed against, the offender should be named.

John Martin Sequeira v. Lufja Bai 671

2. _____, s. 197—*Necessity for sanction to prosecute public servant—Cases in which the fact that accused is a public servant is a necessary element in the offence—City of Madras Municipal Act (Madras)—Act I of 1884, s. 341*

Under section 341 of the City of Madras Municipal Act, any person bringing or causing to be brought timber within the City of Madras without a license, obtained on payment of a fee, is liable to a fine. The Superintendent of the Gun Carriage Factory, in Madras, who is an officer holding a commission in the Royal Artillery, brought or caused to be brought timber within the aforesaid limits without license. On a complaint being

lodged against him under the section, it was contended that he was a public servant within the meaning of section 197 of the Code of Criminal Procedure and that the Court could not take cognizance of the offence inasmuch as the sanction referred to in section 197 had not been obtained:—*Held*, that sanction was not necessary, as the offence charged was not one which could be committed only by a public servant, nor did it involve as one of its elements that it had been committed by a public servant. *Nando Lal Basak v. Mitter*, (I.L.R., 26 Calc., 852), followed.

The Municipal Commissioners for the City of Madras v. Major Bell . . . 15

3. _____, s. 202—*Failure to "record reasons" for postponing issue of process and inquiring into case—Irregularity:*

By section 202 of the Criminal Procedure Code, if a Magistrate is not satisfied as to the truth of an offence he may, when the complainant has been examined, "record his reasons, and may then postpone the issue of process" and inquire into the case:—*Held*, that the failure on the part of a Magistrate to record his reasons is at most an irregularity, and unless it in fact occasions a failure of justice is not a ground for setting aside his order.

King-Emperor v. Alagarisami Pathan . . . 546

4. _____, ss. 233, 234, 235(1)—*Misjoinder of charges—Trial by jury on indictment in which charges have been wrongly joined—Irregularity in criminal proceedings—Count charging continued acts of abetment of extortion and bribery—Penal Code—Act XLV of 1860, ss. 103, 161 and 384—Evidence Act—Act I of 1872, s. 187:*

The appellant was tried at the Criminal Sessions of the High Court, and convicted, on an indictment the first count of which contravened the provisions of sections 233 and 234 of the Code of Criminal Procedure (which provide that every separate offence shall be charged and tried separately, except that three offences of the same kind may be tried together in one charge if committed within the period of one year); and did not fall within the provisions of section 235 (1) (which provides that if, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence). On a case certified under article 26 of the Letters Patent and heard by the Full Court, it was held by the majority of the Court that the union of the first count with the others made the whole indictment bad for misjoinder, but that it was open to them to strike out the first count, rejecting the evidence with regard to it, and deal with the evidence as to the remaining counts of the indictment. This was done with the result that the conviction was upheld on one count only, the sentence being reduced.—*Held*, by the Judicial Committee that the disregard of an express provision of law as to the mode of trial was not a mere irregularity such as could be remedied by section 537 of the Criminal Procedure Code. Such a phrase as "irregularity" is not appropriate to the illegality of trying an accused person for more different offences at the same time, and those offences being spread over a longer period than by law could have been joined together in one indictment. *Smurthwaite v. Hamnau* ([1894] A.C., 494), referred to. In the matter of *Abdur Rahman*, ((1900) I.L.R., 27 Calc., 839), dissented from. Nor could such illegal procedure be amended by arranging afterwards what might or might not have been properly submitted to the jury. To allow this would leave to the Court the functions of the jury, and the accused would never have been really tried at all upon the charge afterwards arranged by the Court. The trial having been conducted in a manner prohibited by law was held to be altogether illegal and the conviction was set aside.

Subrahmanya Ayyar v. King-Emperor . . . 61

5. _____, s. 250—*Frivolous or vexatious accusations—Case instituted on "information given to a Magistrate"—Information to a Village Magistrate—Discharge of accused—Order awarding compensation—Validity:*
 A Village Magistrate is not a Magistrate within the meaning of section 250 of the Code of Criminal Procedure, and where a case has been instituted in consequence of a complaint made to a Village Magistrate who sent a report to the police, who submitted a charge sheet, the person who complained to the Village Magistrate cannot be ordered, under section 250, to pay compensation to the accused if the latter are discharged.
King-Emperor v. Thammama Reddi 667
6. _____, s. 421—*Summary dismissal of appeal—Judgment:*
 A Court, when dismissing an appeal summarily under section 421 of the Code of Criminal Procedure, is not bound to write a judgment in conformity with the provisions of section 367.
King-Emperor v. Krishnappa 534
7. _____, s. 476—*"Judicial Proceeding"—Records of case called for by District Magistrate in his executive capacity:*
 Though an order passed after records have been called for, for any of the purposes specified in section 435 of the Code of Criminal Procedure, may be a "judicial proceeding" for the purposes of section 476 (as to which the Court gave no ruling), where a District Magistrate called for such records in his executive capacity to see whether an application for an enquiry into the conduct of a police constable should be granted, and passed an order thereon, sanctioning his prosecution:—*Held*, that there was no judicial proceeding within the meaning of section 476, and that the order must be set aside.
Sangulia Pillai v. The District Magistrate of Trichinopoly 659
- EVIDENCE ACT—ACT I OF 1872, s. 32 (5)—*Insurance—Policy of Life Insurance—Warranty—Age of assured—Mis-statement of age—Onus of proof: See CONTRACT ACT (1).* 183
2. _____, ss. 63, 65, 90, 114—*Copy of document—No evidence that original could not be produced—Secondary evidence—Presumption:*
 In a suit to recover possession of land, the defendant relied principally on a document which was filed in the Munsif's Court in support of his title. According to the evidence this document had been prepared with reference to a document of an earlier date. This earlier document was not produced, though it was admittedly in existence, nor was it shown that it could not have been produced. The Munsif decreed in plaintiff's favour. On appeal, a copy of the earlier document was produced and filed:—*Held*, that although the exhibit was admissible as secondary evidence, it was only secondary evidence of the contents of a document. There was no evidence that the document, of the contents of which the exhibit was evidence, was in fact executed in 1862 between the parties mentioned, and inasmuch as the exhibit was a copy and not the original, the presumption which, under section 90 of the Evidence Act, may be made where a document over thirty years old is produced, ought not to be made. *Khetter Chunder Mookerjee v. Khetter Paul Sreeterutno*, (I.L.R., 5 Calc., 886), referred to.
Appathura Pattar v. Gopala Panikkar 674
3. _____, s. 92—*Document collateral to a permanent lease of immovable property:*
 An agreement to pay Rs. 500 a month to a lessor in consideration of receiving from him a permanent lease of portions of his zamindari, which agreement was come to before, but reduced to writing after, the execution of the lease, was *held* to be not affected by section 92 of the Evidence Act, nor to require registration either under the Registration Act, section 17, or

the Transfer of Property Act, section 107, where it was not inconsistent with the lease, its provisions formed no part of the holding under the lease, the payment bargained for was no charge on the property, and it was not rent or recoverable as rent, but a mere personal obligation collateral to the lease.

Subramanian Chettiar v. Arunachalam Chettiar ... 603

4. —————, s. 92—Evidence to vary written instrument—
Execution of sale-deed—Subsequent redemption suit on footing that the sale
was in fact a mortgage—Evidence of subsequent conduct to show collateral
agreement—Inadmissibility :

On 23rd September 1876, defendant wrote to plaintiff inviting plaintiff to execute a sale-deed of certain land in favour of defendant and promising that if plaintiff did so, defendant would discharge plaintiff's debts out of the income to be derived from the land, and would, after the debts had been discharged, or before, if so requested, restore the land to plaintiff, upon payment by plaintiff of a sum of money that had been advanced to him by defendant. This document was not registered. On 29th September 1876, plaintiff executed a deed of sale of the land in defendant's favour, which was unconditional in its terms, and which was duly registered. Plaintiff subsequently brought a redemption suit against defendant on the deed of 29th September, and he contended that though that deed was, in its terms, an absolute conveyance, he was entitled to adduce evidence of the subsequent conduct of himself and defendant, to show that the transaction was, in fact, not a sale but a mortgage.—*Held*, that the evidence was not admissible. *Balkrishna Das v. Legge*, (L.R., 27 I.A., 58, I.L.R., 22 All., 149), followed. *Khamkar Abdur Rahman v. Ali Hafez*, (I.L.R., 28 Cal., 256), and *Mahomed Ali Hossein v. Nazar Ali*, (I.L.R., 28 Cal., 289), dissented from. Plaintiff further contended that the contract was not contained in the deed of sale alone, but must be gathered from both of the documents referred to above.—*Held*, that the document of 23rd September being unregistered was inadmissible in evidence as it purported to create or limit an interest in the immoveable property conveyed under the deed of sale. *Pranal Annee v. Lakshmi Annee*, (L.R., 26 I.A., 101, I.L.R., 22 Mad., 508), followed.

Achutamasaaju v. Subbaraju ... 7

5. —————, ss. 114, 133—Evidence of accomplice—Cor-
roboration :

Certain persons were charged with the murder of N. The confessional statement of one of them and the evidence of an approver showed that the accused first attacked N, at a spot described as D, that they then carried him from D to a spot described as E, and that from E they carried him to a spot described as F, where he was killed. Three other witnesses deposed to the presence of the accused at D.—*Held*, that the evidence of the approver was sufficiently corroborated to justify a conviction. *Reg. v. Wilkes*, (7 C. & P., 272) and *Queen v. Elahi Bai*, (B.L.R., Sup. Vol. (F.B.), 459), referred to.

King-Emperor v. Mohiuddin Sahib ... 143

6. —————, s. 167.—Criminal Procedure Code—Act V
of 1898, ss. 233, 234, 235 (1)—Misjoinder of charges—Trial by jury on indictment in which charges have been wrongly joined—Irregularity in criminal proceedings—Count charging continued acts of abetment of extortion and bribery—Penal Code—Act XLV of 1860, ss. 109, 161 and 384 :

The appellant was tried at the Criminal Sessions of the High Court, and convicted, on an indictment the first count of which contravened the provisions of sections 233 and 234 of the Code of Criminal Procedure (which provide that every separate offence shall be charged and tried separately, except that three offences of the same kind may be tried together in one charge if committed within the period of one year), and did not fall within the provisions of section 235 (1) (which provides that if,

in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence). On a case certified under article 26 of the Letters Patent and heard by the Full Court, it was held by the majority of the Court that the union of the first count with the others made the whole indictment bad for misjoinder, but that it was open to them to strike out the first count, rejecting the evidence with regard to it, and deal with the evidence as to the remaining counts of the indictment. This was done with the result that the conviction was upheld on one count only, the sentence being reduced:—*Held*, by the Judicial Committee that the disregard of an express provision of law as to the mode of trial was not a mere irregularity such as could be remedied by section 537 of the Criminal Procedure Code. Such a phrase as “irregularity” is not appropriate to the illegality of trying an accused person for more different offences at the same time, and those offences being spread over a longer period than by law could have been joined together in one indictment. *Smurthwaite v. Hannay*, ((1894) A.C., 494), referred to. *In the matter of Abdur Rahman*, ((1900) I.L.R., 27 Cal., 839), dissented from. Nor could such illegal procedure be amended by arranging afterwards what might or might not have been properly submitted to the jury. To allow this would leave to the Court the functions of the jury, and the accused would never have been really tried at all upon the charge afterwards arranged by the Court. The trial having been conducted in a manner prohibited by law was held to be altogether illegal and the conviction was set aside.

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HINDU LAW—*Division of family property—Agreement that share of one member in income of village should be paid him by managing member—Subsequent claim for partition:*

By an agreement entered into by the members of a family, of whom plaintiff was one, the parties became completely divided in interest in respect of all their property, but so far as a certain village was concerned it was agreed that plaintiff should receive one-fourth of the net income (on account of his fourth share in the village) from the eldest member of the family, who was to manage it. Plaintiff now sued for partition by metes and bounds of his one-fourth share in this village:—*Held*, that the agreement was no bar to the suit.

Subbaraya Tarkler v. Rajaram Tarkler 585

2. ——— *Enfranchisement of land in favour of widow as personal inam land—Lease by widow—Sale of the land by her reversioner—Validity of lease—Title of purchaser:*

Certain land had been enfranchised in favour of a Hindu widow as personal inam land. The widow executed a lease in respect of it in favour of the defendants. The reversioners of the widow sold the land to plaintiff, who, after the widow's death, sued to recover possession of it from the lessees, on the ground that their lease was not valid as against the reversioners nor as against plaintiff as their vendee:—*Held*, that the plaintiff had shown no title.

Subba Naidu v. Nagayya 424

3. ——— *Impartible estate—Adoption—Rights of natural father of adopted son as reversionary heir to son's estate:*

The first defendant in this suit was the adoptive mother of N, who died. N was the last holder of an impartible zamindari, and on his decease, first defendant enjoyed the estate. Plaintiff now sued for a declaration that he was entitled to the estate as reversioner, in preference to a senior brother of the first defendant, basing his claim principally on the ground that he was the natural father of N:—*Held*, that this relationship did not entitle plaintiff to claim as reversionary heir. In determining the degree of propinquity to the deceased adopted son in his adoptive family, in

which the question of reversionary succession arose, a claimant should not be regarded as next of kin because of his relationship as natural father, which, for purposes of inheritance, is immaterial. An adopted son is, for mutual rights of succession, completely severed from his family. *Srinivasa Ayyangar v. Kuppan Ayyangar* (1 M.H.C.R., 180), followed. As to whether such natural relationship would be efficacious to intercept an escheat to the Crown.—*Quære*.

Muthayya Rajagopala Thevar v. Minakshi Sundara Nachiar...

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4. ———— *Mitakshara doctrine of joint family property—Limitation Act Act XI of 1877, sched. II, art. 106—Partnership—Contract Act—Act IV of 1872, ss. 239, 253.*

V and his five sons constituted an undivided Hindu family. V and his three elder sons lived apart from the two younger sons and were in possession of some ancestral property. The two younger sons were plaintiff and first defendant respectively in this suit. Plaintiff sued this brother for an account and for partition of certain property which he alleged to be the property of a joint family consisting of the first defendant and himself. The property had, as plaintiff alleged, been acquired from the funds of a business which had been carried on jointly by him and first defendant until 1894, and continued by the first defendant until the institution of the suit. It was alleged that although there had not been an express agreement of partnership, in the circumstances of the case an agreement under which plaintiff had become jointly interested in the business ought to be inferred:—*Held*, that plaintiff had not a joint interest in the contract business and was not entitled to claim a share in it. *Held also*, that even if such an interest had existed plaintiff's claim was barred by limitation. *Moung Tha Hnyin v. Mah Thein Myah*, (L.R., 27 I.A., 189; I.L.R., 28 Cal., 53), distinguished. *Per* BHASHYAN AYYANGAR, J.—It was impossible to regard plaintiff and first defendant as forming in themselves an undivided family owning joint family property as a corporate body. *Sham Narain v. Court of Wards*, (20 W.R., (C.R.), 197), commented on. The origin and nature of the Mitakshara doctrine of joint family property discussed. *Peddaiyya v. Ramalingam*, (I.L.R., 11 Mad., 406), referred to. *Radha Churn Dass v. Kripa Sindhur Dass*, (I.L.R., 5 Cal., 474), considered. *Rampershad Teicarry v. Sheochurn Dass*, (10 M.L.A., 490), distinguished.

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5. ———— *Property inherited by widow from her husband—Acquisitions with the income thereof—No indication of intention by widow to make the acquired property part of the husband's estate for the benefit of his heirs—Presumption that widow intended to retain control:*

A Hindu widow inherited certain property from her husband, and with the income thereof acquired land on a usufructuary mortgage for 52 years. She assigned the unexpired portion of the term of the mortgage for consideration, and subsequently died. The reversionary heirs to her late husband then sued her assignees for the property. There was no evidence that the widow had ever indicated any intention to make the property part of her husband's estate for the benefit of his heirs:—*Held*, that there was no presumption that the widow intended to part with her power of disposition for the benefit of her reversionary heirs. The acquirer of property presumably intends to retain dominion over it, and in the case of a Hindu widow the presumption is none the less so when the fund with which the property is acquired is one which, though derived from her husband's property, was at her absolute disposal. Inasmuch as the widow's absolute power of disposition over the income derived from the widow's estate, is now fully recognized, she will be presumed, in the absence of an indication of her intention to the contrary, to retain the same control over the investment of such income. Nor is that presumption affected by the fact that properties thus acquired by her are managed and enjoyed by her without any distinction, with properties inherited from her husband. She is the sole and separate owner of the two sets of properties, so long as she enjoys them, and is absolutely entitled to the income from both. The title of the assignees of the widow was upheld.

Isri Dut Kuer v. Mussunni Hansbetti Koerain, (L.R., 10 I.A., 150; I L.R., 10 Cal., 324 at p. 337), and *Sadamini Dasi v. The Administrator-General of Bengal*, (L.R., 20 I.A., 12; I.L.R., 20 Cal., 433), referred to.

Akkanna v. Venkayya 351

6. ———— *Proposed agreement with all members of Hindu family—Agreement not perfected—Execution of document by eldest brother upon understanding that all would join—Refusal by younger brothers to execute—Suit on document dismissed:*

Plaintiff sued two brothers and the minor son of the elder of them on a hypothecation bond, which recited that it was executed by the elder on his own behalf and on behalf of his minor son, and by his two brothers (one of whom was now deceased) on their own behalf respectively. In fact, it was signed only by the eldest, for himself and for his son, the other brothers having refused to execute it when asked to do so. The defence was that no suit could be brought on the document inasmuch as it was not completed; and the younger of the two surviving brothers further contended that the loan had not been contracted for his benefit; that the eldest brother had not executed the bond on his behalf and that he had never agreed to execute it himself. The document separately named each of the three brothers as parties; they were not described as being undivided and the eldest was described as only representing his son:—*Held*, that the document constituted merely a proposed agreement which had never been perfected; the plaintiff having contracted and the eldest brother having executed it, upon the understanding that the two younger brothers would join in its execution, and that neither the elder nor the younger defendant was liable. *Held also*, that if the parties intended that all the members of the family should execute the document it could not take effect by reason that the person who had alone executed it happened to be the managing member, and that the debt was recited to have been incurred for the benefit of the family.

Sivasami Chetti v. Serugan Chetti 389

7. ———— *Sudras—Division of property by brothers—Two sons born to one divided brother by concubine—Decease of both illegitimate sons, leaving sons of their own—Claim by divided brother against the grandsons for property of the deceased divided brother:*

Plaintiff and R were divided brothers in a family of Sudras. R kept a permanent concubine, by whom he had two illegitimate sons. Both of these sons predeceased R, leaving legitimate sons of their own then surviving. R then died. Plaintiff now sued, claiming to be his heir, to recover his property, which was in the possession of R's grandsons:—*Held*, that plaintiff was not entitled to recover. Whether an illegitimate son of an illegitimate son could, on the principle of *jus representationis*, represent the illegitimate son if, before the inheritance opened, the latter predeceased his father.—*Quære*.

Ramalinga Muppan v. Paradai Goundan 519

8. ———— *Sudras—Illegitimate son—Claim to partition of property of father's brother's sons—Maintainability:*

An illegitimate son claimed to be entitled to a share in the property of his father's brother's sons:—*Held*, that he was not so entitled; and that the principle laid down in *Raja Jogendra Bhupati Hurri Chundun Mahapatra v. Nityanund Mansingh*, (L.R., 17 I.A., 128; I.L.R., 18 Cal., 151)—where it was held that an illegitimate son is a co-parcener of his father's legitimate son—should not be extended to the case of other collateral heirs, having regard to the rulings in *Krishnayyan v. Muttusami*, (I.L.R., 7 Mad., 407), *Ranoji v. Kandoji*, (I.L.R., 8 Mad., 557), and *Parvathi v. Thirumalai*, (I.L.R., 10 Mad., 334). *Shome Shankar Rajendra Varare v. Rajesar Swami Jangam*, (I.L.R., 21 All., 99), approved.

Karuppa Goundan v. Kumarasami Goundan 429

9. ———— *Purchase from member of an undivided family—Undivided share of vendor in land forming part of the joint estate—Death of vendor—Subsequent suit by purchaser against survivors for partition of entire estate, for recovery of the portion purchased—Maintainability:*

Plaintiff purchased 2 acres and 26 cents of land from V, being V's undivided moiety in two plots of land measuring 4 acres and 52 cents, which formed part of the joint property of an undivided Hindu family consisting of V and his two nephews (brother's sons). V subsequently died, leaving his two nephews him surviving. After V's decease, plaintiff instituted the present suit against the nephews, in which he claimed partition of the whole of the family property and sought thereby to recover out of the half share which might fall to his vendor, V (now deceased) the specific 2 acres and 26 cents which he bought from V or land of similar size and quality —Held, that the suit was maintainable. *Per BHASHYAM AYYANGAR, J.*—Plaintiff was entitled to recover a moiety of the plots of land in question if such moiety could have been equitably allotted to the plaintiff's vendor's share in case a partition of all the family property, between him and his nephews, had been effected immediately before the sale to the plaintiff. Observations by Bhashyam Ayyangar, J., on the character and incidents of an alienation, made by an undivided member of a Hindu family, of his share and interest therein. *Rangasami v. Krishnayyan*, (1 L.R., 14 Mad., 408), considered.

Aiyiyagari Venkataramayya v. Aiyiyagari Ramayya 690

10. ———— *Inheritance—Mitakshara Law—Interest taken by daughters' sons in self-acquired property of grandfather—Survivorship—Revocation of Hindu will—Appeal to Privy Council—Printing of unnecessary matter in Record:*

Actual destruction or a formal revocation in writing is not essential to constitute revocation of a Hindu will which does not depend on any English Ordinance or Code. Under the Mitakshara Law a daughter succeeding to the self-acquired property of her father takes a limited and restricted estate only, and such property does not become her stridhan. *Chotey Lal v. Chunnoo Lal*, ((1875) 1 L.R., 4 Calc. 744; L.R., 6 I.A., 15), and *Mattu Vaduganadha Tevar v. Dorasingu Tevar*, ((1881) 1 L.R., 8 Mad., 250; L.R., 8 I.A., 99), followed. On the death of the daughter her sons therefore succeeded to the property as heirs of their grandfather, and, there having been no partition between them, they took it as ancestral property which had devolved upon them as members of a united family under the ordinary law of inheritance, viz., jointly with right of survivorship. It is the right to partition which determines the right to take by survivorship, and where there has been no partition the survivor takes. According to the Mitakshara Law the doctrine of survivorship is not limited to unobstructed succession and to the succession to the joint property of re-united co-parceners. *Jasoda Koer v. Sheo Pershad Singh* (1889) 1 L.R., 17 Calc., 33; and *Saminadha Pillai v. Thangathamm*, ((1895) 1 L.R., 19 Mad., 70), overruled. The Judicial Committee expressed their strong disapproval of the unnecessary expense incurred in this case owing to the printing in the record of a large quantity of matter which was useless for the purpose of the appeal, characterizing such extravagance as an abuse of the rights of suitors whether appellants or respondents, and suggesting the propriety of the High Court in India exercising its jurisdiction over those who conduct litigation and prepare appeals from its decisions, and taking such steps as might be practicable to compel those who were to blame to pay the costs unnecessarily incurred.

Venkayamma Garu v. Venkataramanayamma Bahadur Garu 678

- INDIAN COUNCILS ACT (1861), 24 & 25 VICT., CAP. 67, s. 42.—*City of Madras Municipal Act (Madras)—Act I of 1884, s. 341—Liability of Government under taxing Acts when not expressly mentioned—Prerogatives of the Crown:*

The superintendent of the Government Gun Carriage Factory in Madras having brought timber belonging to Government into Madras without taking out a license and paying the license fees prescribed by section 341 of the City of Madras Municipal Act, was prosecuted to conviction by

the Municipal Commissioners:—*Held*, on revision, that timber brought into Madras by or on behalf of Government is liable to the duty imposed by section 341 of the City of Madras Municipal Act although Government is not named in the section. According to the uniform course of Indian Legislation, Statutes imposing duties or taxes bind Government unless the very nature of the duty or tax is such as to be inapplicable to Government. *Per curiam*:—Under the Indian Councils Act, 1861, a Provincial Council has, subject to the same restrictions as those imposed by the Act on the Governor-General's Council, power to affect the prerogative of the Crown by Legislation.

Bell v. The Municipal Commissioners for the City of Madras ... 457

INDIAN RAILWAY ACT—ACT IX OF 1890, ss. 7, 10, 11—*Compensation for damage caused by railway works—Suit to enforce construction of a channel to irrigate land—Maintainability:*

Plaintiff alleged that the execution of certain works by a Railway Company, under section 7 of the Indian Railway Act had interfered with his right to the flow of water to his land. He did not suggest that the Company had exceeded the powers conferred on them by that section, but claimed that they had failed to discharge the obligation, imposed by section 11 (b) of the Act, to make the necessary accommodation works, and sought a decision of the Court that such works should be executed.—*Held*, that he had no right of action. The effect of section 11 of the Indian Railway Act is that the opinion of the executive, with reference to the sufficiency of accommodation works, is final.

Seetamraju Kondal Row v. The Collector of Godavari ... 632

INSOLVENT DEBTORS' ACT—11 & 12 VICT., CAP. 21, s. 23:—*See LETTERS PATENT and CIVIL PROCEDURE CODE (4).*

INSURANCE—*Policy of Life Insurance—Warranty—Age of assured—Mis-statement of age—Onus of proof—Contract Act—Act IX of 1872, s. 65—Return of premium paid on policy subsequently held void:—See CONTRACT ACT (1).*

LAND IMPROVEMENT LOANS ACT—ACT XIX 1883, s. 7, cl. 1 (a)—*Revenue Recovery Act—Act II of 1864 (Madras), s. 12—Advance to owner of two pieces of land—Security taken on one alone—Sale of the other piece in respect of advance—Validity:*

N held two pieces of land on patta and obtained a loan from Government, under Act XIX of 1883, for the improvement of one of them, namely, No. 315. The other piece, namely, No. 105-B. was not made collateral security for the loan. Default having been made in repayment of the loan, piece No. 315 was, in 1894, attached and put up for sale and (as there were no bidders) bought in by Government. In 1895, N sold the other piece of land, No. 105-B, to plaintiff, but the patta was not transferred. In 1896, No. 105-B was attached by Government in respect of N's unpaid loan. Plaintiff objected to its sale, claiming title to it as purchaser, and in 1897, both N and plaintiff applied for a transfer of the patta to plaintiff. The transfer was not made as the loan to N had not been repaid. The land was ultimately sold by Government to first defendant, whereupon plaintiff brought this suit for a cancellation of that sale:—*Held*, that plaintiff was entitled to the relief claimed.

Chinnasami Mudali v. Tirumalai Pillai and the Secretary of State for India ... 57

LETTERS PATENT, Art. 15—*"Judgment"—Appeal:*

An order passed by a Judge sitting on the Original Side of the High Court dismissing a claim preferred under sections 278 and 282 of the Code of Civil Procedure by the mortgagees of immoveable property which has been attached in execution of a decree, is subject to appeal. Article 15 of the Letters Patent is not restricted by sections 588 and 591 of the Code of Civil Procedure.

Subhapathi Chetti v. Narayanasami Chetti ... 553

2. ————— “Judgment” — Appeal — Insolvent Debtors’ Act —
11 & 12 Vict., cap. 21, s. 23 — Reputed ownership — Charge on debts — Civil
Procedure Code — Act XIV of 1882, s. 372 — Devolution of interest of judgment-
debtor upon Official Assignee.

An order dismissing an application by a judgment-creditor of an insolvent for a sum of money in the hands of the Official Assignee to be paid by the Official Assignee to the judgment-creditor, is a “judgment” within the meaning of article 15 of the Letters Patent, and an appeal lies therefrom. In March 1897, B covenanted to repay by instalments a sum of money owing by him to plaintiff, and mortgaged his stock-in-trade and all outstandings and moneys then due and owing and thereafter to become due and payable to him. B remained in possession. In July 1899, plaintiff sued B on the mortgage-deed. In August 1899, upon an *ex-parte* application by the plaintiff, an order by way of injunction was made in the suit restraining the mortgagor from disposing of the stock-in-trade and outstandings and debts payable to him. This injunction was subsequently dissolved. In the same month plaintiff gave notice to a person indebted to B that plaintiff claimed the amount of the debt under his mortgage. In September 1899, B was adjudged an insolvent and the usual vesting order was made. In October 1899, plaintiff obtained a decree in his suit, by which it was ordered that B should pay the principal and interest due under the mortgage-deed and that in default of payment the mortgaged premises should be sold. In February 1900, the person indebted to B paid the amount of his debt to the Official Assignee. In September 1900, an order was made in plaintiff’s suit against the insolvent directing that the decree should be executed by the attachment of the money in the hands of the Official Assignee. In December 1900, plaintiff applied by summons in his suit against the insolvent for an order that the Official Assignee should pay over that money:—*Held*, that plaintiff was not entitled to the order. The decree, as a mortgage decree directing the sale of the chattels, including the debt in question, was void and inoperative as against the Official Assignee inasmuch as the whole right, title and interest of the defendant devolved by operation of law upon the Official Assignee during the pendency of the suit and before the decree had been passed. Nor was the position of the Official Assignee affected by the doctrine of *lis pendens*. The party seeking to bind him by the result of the suit (pending which the interest in its subject-matter had devolved upon the Official Assignee by operation of law) should have applied under section 372 of the Code of Civil Procedure to have him joined as a party to the suit. *Miller v. Budh Singh Dudhuria*, (I.L.R., 18 Cal., 43), referred to. Where a debtor has assigned a debt, notice by the assignee to the person owing the debt will take it out of the order or disposition of the debtor. *Per* SIR ARNOLD WHITE, C.J.—A chose in action, if it is a debt due to the insolvent in his trade or business, comes within the words “goods and chattels” as contained in section 23 of the Indian Insolvent Debtors’ Act. *Per* BHASHYAM AYYANGAR, J.—The instrument only created a charge or hypothecation in plaintiff’s favour, but a chargeholder is as much the substantial owner of and has as substantial an interest in the goods and chattels as a mortgagee thereof, and if either allows the mortgagor or the person creating the charge to remain in possession, under circumstances which will lead to his being the reputed owner and to his being enabled to command credit thereby, he will be estopped from asserting his substantial interest or ownership in the property as against the Official Assignee. A debt is taken out of the order and disposition of an insolvent if a suit be brought to enforce a charge upon the debt prior to his adjudication.

Punithavelu Mudaliar v. Bhashyam Ayyangar 406

3. ————— “Judgment” — Order dismissing petition praying
Court to receive security for costs — Appeal:

An order dismissing a petition praying the Court to receive a sum of money as security for the costs of an appeal is a judgment within the meaning of article 15 of the Letters Patent and an appeal lies therefrom.

Vidhyasurana Thirthaswami Vidyaniidhi Thirthaswami 654

4. ————— "Judgment"—Revision petition against decree in

small cause suit—Difference of opinion—Appeal—Civil Procedure Code—Act XIV of 1882, s. 575—Contract Act—Act IX of 1872, s. 72—Right to recover money had and received to plaintiff's use unaffected by section 72.

The plaintiff in a small cause suit having obtained a decree, the defendant filed a civil revision petition in the High Court. At the hearing by a Bench, one learned Judge expressed the opinion that the case should be remanded for disposal according to law after further evidence had been taken, whilst the other held that the case was not one with which the High Court should interfere. The defendant then preferred an appeal under article 15 of the Letters Patent, when a preliminary objection was taken to the hearing of the appeal, on the ground that there had been no judgment within the meaning of the article:—*Held*, that the adjudication by the Bench was a judgment within the meaning of article 15 of the Letters Patent. *Held* also, that the case was governed by section 575 of the Code of Civil Procedure, and not by article 36 of the Letters Patent. Defendant had sought to exercise, as against plaintiff, the special powers conferred upon landholders by section 38 of the Rent Recovery Act. In fact, the relations between defendant and plaintiff were not such as entitled defendant to exercise those powers. Plaintiff, in order to avert the injury which he would have sustained if his interest in the land had been sold, paid the amount demanded by the defendant, and now sued to recover from the defendant the sum so paid. *Held*, that plaintiff was entitled to recover the money paid by him as money had and received by defendant to the use of the plaintiff. Section 72 of the Contract Act in no way affects the principle of law that where a defendant has received money which in justice and equity belongs to a plaintiff, under circumstances which render a receipt of it a receipt by the defendant to the use of the plaintiff, the plaintiff is entitled to recover. *Jugdeo Narain Singh v. Raja Singh*, (I.L.R., 15 Cal., 656), approved.

Narayanasami Reddi v. Osuru Reddi 518

LIMITATION—Continuing nuisance—Opening of burial and burning ground—“Convenient and fitting place”—Smoke from burning ground—Actionable nuisance—Public body—Protection:—See CITY OF MADRAS MUNICIPAL ACT (MADRAS).

LIMITATION ACT—ACT XV OF 1877, s. 5—“Sufficient cause” for not presenting appeal within prescribed period—Interference with exercise of discretion by Appellate Court:

Plaintiff, who had in 1893 been dismissed by the first defendant from his office of karnam, endeavoured to establish his right to the office, in 1894, in the Court of the Deputy Collector, who, in April of that year, dismissed the application and referred plaintiff to a Civil Court. On appeal, the Collector affirmed that decision. In February 1896, plaintiff filed the present suit in the Court of the District Munsif, who, on 20th January 1898, dismissed it, on the ground that his jurisdiction was ousted by the Madras Proprietary Estates' Village Service Act, 1894. He considered that the Collector's Court was the proper tribunal. Plaintiff applied for copies of the Munsif's judgment and decree on the same day, and received those copies on 18th February 1898. On 5th March 1898 he moved the Deputy Collector, who, on 13th June, rejected his petition. A copy of the latter order was delivered to plaintiff on 14th July 1898, and he preferred on appeal to the Collector on 25th July 1898, which was dismissed on 25th November 1898. A copy of that order was delivered to plaintiff on 7th December 1898, and the records were returned to him on 28th December 1898. On 4th January 1899, plaintiff preferred an appeal to the Subordinate Court against the Munsif's order of 20th January 1898. The Subordinate Judge admitted the appeal as he considered that the proceedings which plaintiff had taken before the Deputy Collector and Collector had been *bonâ fide* and that his failure to appeal against the Munsif's order within the time allowed by law was in consequence of his having pursued the remedy which had

been pointed out by the Munsif as the proper one. On its being contended, on second appeal, that the Subordinate Judge ought not to have admitted the appeal to him under section 5 of the Limitation Act - *Held*, (BENSON, J., dissenting), that the appeal ought not to have been admitted. *Held, per curiam*, that a mere difference in view on the part of the High Court, as to the mode in which the discretion conferred by section 5 of the Limitation Act ought to have been exercised by the lower Appellate Court in admitting an appeal, is in itself no ground of interference by the High Court. *Per* Sir ARNOLD WHITE, C.J., (MOORE, J., concurring) :- The test is, - Has the discretion been exercised after appreciation and consideration of all the facts which are material for the purpose of enabling the Judge to exercise a judicial discretion and after the application of the right principle to those facts? If a discretion is exercised under these conditions and a certain conclusion is arrived at, that conclusion is an exercise of discretion judicially sound though an appellate tribunal might be disposed to draw a different inference from the facts. The Subordinate Judge had not considered all the facts which were material for the exercise of judicial discretion, and if he did consider them he had applied a wrong principle. The material question was whether the appellant had been diligent during the period of delay, - not whether he had been misled by the Munsif, or whether his proceedings before the Collector were *bonâ fide*. *Per* BENSON, J. - There is a wide distinction between the law of limitation in respect of suits and in respect of appeals. The "sufficient cause," (referred to in section 5 of the Limitation Act), apparently means not only those circumstances which are expressly recognized as extending time, but also such circumstances as are not expressly recognized, but which may appear to the Court to be reasonable.

Kichilappa Naicker v. Ramanujam Pillai 166

LIMITATION ACT—ACT XV OF 1877, ss. 7, 8, sched. II, art. 106—Suit by joint claimants, one being a minor—Bar of limitation saved as against all :

In 1885, five persons commenced to carry on business in partnership. In 1890, P (one of them) died. No accounts were taken, nor were the heirs of P introduced as partners into the partnership. The four surviving partners continued to carry on the business. In 1891, C (one of them) died. No accounts were taken, nor were the heirs of C introduced as partners into the partnership. The three surviving partners continued to carry on the business. In 1898, the legal representatives of C instituted this suit against the surviving partners and the representatives of the deceased partners for an account and for a share of the profits of the partnership which was formed in 1890, on the death of P, and dissolved in 1891, on the death of C. The third plaintiff was a minor at the date of C's death, and was still in her minority at the date of suit. On its being contended that the suit was barred by limitation - *Held*, that the starting point for computing the period of limitation was the date of C's death. The present suit could not be regarded (within the meaning of article 106 of schedule II to the Limitation Act) as a suit in part for an account and a share of the profits of the original partnership. When a partnership is determined by death and the surviving partners continue to carry on the business, the Limitation Act is no bar to taking the accounts of the new partnership by going into the accounts of the old partnership which have been carried on into the new partnership without interruption or settlement. *Held also*, that though the new partnership was dissolved by the death of C in 1891 and the suit would be barred, *primâ facie*, by article 106 of schedule II to the Limitation Act, the bar was saved by sections 7 and 8 of that Act, inasmuch as the third plaintiff was and still continued a minor. The effect of section 8 was to save the bar in the case of all the plaintiffs, as they were joint claimants with the third plaintiff and none of them could give or could at any time have given the partners of C a discharge from liability to C's representatives without the concurrence of the third plaintiff. The combined operation of sections 7 and 8 of the Limitation Act considered. *Barber Maran v. Ramana Goundan*, (T.L.R., 20 Mad., 461), discussed. The decision in that case held inapplicable to a case of co-heirs. *Seshan v*

Rajagopala, (I.L.R., 13 Mad., 236), and *Kandhiya Lal v. Chandar*, (I.L.R., 7 All., 313), approved as to the construction of section 7 of the Limitation Act.

Ahmsa Bibi v. Abdul Kader Saheb

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2. _____, sched. II, arts. 62, 97—*Assignment of mortgage over immoveable property by unregistered document—Receipt by assignor of mortgage amount in fraud of assignee—Suit by assignee against assignor within three years of receipt of mortgage money:*

By an agreement in writing, but not registered, bearing date 21st August 1895, defendant assigned a mortgage over certain lands to plaintiff for a consideration which was duly paid. In 1898, the mortgagor brought a suit against plaintiff and defendant to redeem the mortgage and to recover possession of the property, and a decree was passed on 15th October of that year, in which the Court refused to recognize plaintiff's title because of the non-registration of the assignment. Defendant thereupon received the mortgage amount as mortgagee from the mortgagor. Within three years of the said receipt by defendant of the mortgage amount, plaintiff brought this suit to recover from defendant the sum paid as consideration for the transfer of the mortgage in 1895. Upon the defence of limitation being raised—*Held*, that the suit was not barred. Defendant by receiving the mortgage amount from the mortgagor, in fraud of plaintiff's right, received it for plaintiff's use. The suit was therefore governed by article 62 of schedule II to the Limitations Act and was not barred inasmuch as it had been instituted within three years of the receipt of the money by defendant. Moreover, as possession of the mortgaged land had been given, under the document of 1895, to plaintiff and held by him until its redemption by the mortgagor, there was consideration at the time when the assignment was made, and that consideration afterwards failed. Inasmuch as the suit had been brought within three years of the date of the failure of consideration, article 97 would apply and the suit would not be barred.

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3. _____, sched. II, art. 106—*Hindu Law—Mitakshara doctrine of joint family property—Partnership—Contract Act—Act IX of 1872, ss. 239, 253:*

V and his five sons constituted an undivided Hindu family. V and his three elder sons lived apart from the two younger sons and were in possession of some ancestral property. The two younger sons were plaintiff and first defendant respectively in this suit. Plaintiff sued this brother for an account and for partition of certain property which he alleged to be the property of a joint family consisting of the first defendant and himself. The property had, as plaintiff alleged, been acquired from the funds of a business which had been carried on jointly by him and first defendant until 1894, and continued by the first defendant until the institution of the suit. It was alleged that, although there had not been an express agreement of partnership, in the circumstances of the case an agreement under which plaintiff had become jointly interested in the business ought to be inferred:—*Held*, that plaintiff had not a joint interest in the contract business and was not entitled to claim a share in it. *Held also*, that even if such an interest had existed plaintiff's claim was barred by limitation. *Moung Tho Hnyun v. Mah Thein Myah*, (L.R., 27 L.A., 189; I.L.R., 28 Cal., 53), distinguished. *Per BHASHYAM AYYANGAR, J.*—It was impossible to regard plaintiff and first defendant as forming in themselves an undivided family owning joint family property as a corporate body. *Sham Narain v. Court of Wards*, (20 W.R., (C.R.), 197), commented on. The origin and nature of the Mitakshara doctrine of joint family property discussed. *Peddappa v. Ramanangam*, (I.L.R., 11 Mad., 406), referred to. *Radha Churn Dass v. Kripa Sindh Dass*, (I.L.R., 5 Cal., 474), considered. *Rampershad Teuarry v. Sheochurn Dass*, (10 M.I.A., 480), distinguished.

Sudarsanam Maistri v. Narasimhulu Maistri

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LIMITATION ACT—ACT XV OF 1877, sched. II, art. 116—*Breach of contract in writing registered—Leave of villages—Failure by lessee to put lessee in possession—Executory contract to deliver such possession as the nature of the property admits—Mere execution of lease of villages not a delivery of possession*

By a registered document, dated 11th November 1893, defendant leased certain villages to plaintiff for a term of seven years and eight months. On 5th December 1893, plaintiff applied to be put into possession of the villages, but never obtained possession. On 11th November 1899, plaintiff brought this suit for possession and in the alternative for the damages which he had sustained by the failure on the part of defendant to put him into possession. On the plea of limitation being set up:—*Held*, that the claim for damages was not barred, it being governed by article 116 of schedule II to the Limitation Act. Both in the case of a sale and of a lease, the registered instrument by which such sale or lease is effected not only operates as a grant, but, in the absence of a contract to the contrary, is also construed and operates as an executory contract to deliver to the vendor or lessee such possession of the property as its nature permits; and the breach of such an obligation is a breach of a contract in writing registered within the meaning of the article referred to. It was also contended by the defendant that, inasmuch as the ryots were in actual occupation of the villages which formed the subject matter of the lease, the defendant had, in fact, by the mere execution and delivery of the lease, given plaintiff such possession as the subject matter of the lease permitted and that plaintiff could have collected the rents without any further act on the part of the defendant. *Held*, that possession had not been given.

The Zemindar of Vizianagram v. Behara Suryanarayana Patruhu. ... 587

2. —————, sched. II, art. 116—“Contract in writing registered” signed by one party thereto—*Plaint—Sufficient disclosure of cause of action:*

During the course of certain litigation in which B was suing A on a promissory note a compromise was arrived at under which A undertook to execute a mortgage in favour of B and, in consideration thereof, B undertook to withdraw an appeal which was pending at the time. The mortgage was executed, and the undertaking to withdraw the appeal was embodied in the mortgage deed, which was registered, but signed only by A. B, in breach of his undertaking, permitted the appeal to proceed, and obtained a decree on 20th November 1891, which he subsequently executed against A, recovering the value of the promissory note upon which he had originally sued. He also retained the mortgage which had been executed in the compromise. A now sued to recover from B the amount which B had collected under the decree, stating the cause of action as having arisen on the date of that collection, namely, 29th October 1893, when it was contended that the suit was not maintainable inasmuch as the decree had not been set aside, and that even if treated as a suit for damages for breach of the undertaking to withdraw the appeal, it was barred, as the date of the breach was the date of the decree, (viz., 20th November 1891), which had been wrongly obtained, and this suit had not been brought within three years from that date, the plaint having been filed on 14th September 1896—*Held*, that inasmuch as all necessary allegations were made in the plaint, the contract and its breach being alleged, and as the defendant understood what the claim against him was, the plaint sufficiently disclosed a cause of action for damages for the breach of contract. *Held also*, that the undertaking in the mortgage was “an agreement in writing registered” within the meaning of article 116 of the Limitation Act and that consequently the claim was not barred. The fact that the instrument was not signed by B did not take the case out of the operation of that article.

Kotappa v. Vallur Zemindar ... 50

3. —————, sched. II, art. 116—*Receipt for money, containing terms of sale, signed by vendor and not by purchaser—“Contract in writing registered”:*

The mere recital, in a sale-deed, that the consideration has been paid is not a “contract in writing” to pay the consideration within the

meaning of article 116 of the second schedule to the Limitation Act; and where a sale-deed contains the contract of sale which has preceded the actual sale, article 116 may apply even though the sale-deed contains an acknowledgment that the consideration has been paid, when in fact it has not been paid. *Aruthala v. Dayamma*, (I.L.R., 24 Mad., 233), followed. *Semle*, that a document executed and given by a vendor of property to his purchaser, and registered, acknowledging payment of a sum of money on account of the purchase price, and providing that the balance should be paid within a certain date, is a "contract in writing registered," within the meaning of article 116 of the second schedule of the Limitation Act, though it be not signed by the purchaser. *Kotappa v. Vallur Zemindar*, (I.L.R., 25 Mad., 50), and *Ambalavana Pandaram v. Vaguan*, (I.L.R., 19 Mad., 52), approved.

Seshachala Naikar v. Varada Chariar 55

4. —————, sched. II, art. 120.—*Alienation by widow—Subsequent suit to set it aside—Withdrawal of suit without permission to bring a fresh suit—Confirmation of original alienation—Fresh cause of action to sons of the daughters:*

V, who was possessed of lands, died in 1868, leaving a widow and three daughters him surviving. In 1874, the widow alienated the land. In 1892, the daughters sued to have that alienation set aside, but withdrew the suit on the ground that the alienation was valid, without obtaining leave to sue again. In 1895, the daughters' sons instituted the present suit for a declaration that neither the original alienation nor its confirmation by the withdrawal petition in the suit should be effective as against them. On the plea of limitation being raised:—*Held*, that the withdrawal of the suit of 1892 on the ground that the alienation was valid, without permission to bring a fresh suit, was a confirmation of the alienation of 1874, and gave a fresh cause of action, and that the suit was not barred.

Akkineri Sreeramulu v. Mullapudi Ramayya 731

5. —————, sched. II, art. 123.—*Legacy in satisfaction of indebtedness—Claim for legacy with ancillary claim for administration of estate:*

By his will dated 27th April 1887, a testator provided as follows:—"My older brother Ry. V. K. G.'s self-acquisition to the extent of about Rs. 10,000 is kept with me. So, that money should be given to him." The testator died on 14th September 1888. In January 1897, plaintiff received Rs. 6,000 on account and on 9th May 1899 he filed this suit against the son and executors of the deceased claiming that an account might be taken of the testator's property; and that it might be administered by the Court, and that the balance of principal and interest might be paid to plaintiff. It was contended in defence that the Rs. 10,000 was not a legacy, but either a loan by plaintiff to the deceased or a deposit payable on demand, and that in either case it was barred by limitation.—*Held*, that the bequest was a legacy in satisfaction of the indebtedness of the testator to plaintiff. *Held* also, that although plaintiff prayed for an administration of the estate that prayer was only ancillary to his claim for the legacy; that article 123 of schedule II of the Limitation Act was applicable and that the suit was not barred. It was also contended that plaintiff was estopped from claiming a legacy under the will as he had disputed the validity of the latter, and had elected to take the Rs. 10,000 as a debt due to himself and not as a legacy. It appeared that plaintiff's brother had sued for a share in the testator's estate as family property and that plaintiff had supported him and had also claimed a share. *Held*, that there was no estoppel and plaintiff's right to the legacy was not affected by that claim.

Rajamannar v. Venkatachalamayya 361

6. —————, sched. II, art. 134.—*Inapplicability to case of involuntary sale:*

Where, in execution of a money-decree, immoveable property of a judgment-debtor, in which his real interest is only that of a mortgagee, is attached and brought to sale, the auction-purchaser is not a purchaser

from the mortgagee within the meaning of article 131 of schedule II of the Limitation Act, even though the property was sold as the property of the judgment-debtor without any limitation of his interest therein. Article 134 only applies to cases in which the mortgagee disposes of the property voluntarily. *Muthu v. Kambalinga*, (I.L.R., 12 Mad., 316), overruled. *Per* SHEPHARD and DAVIES, JJ.—Where a purchase is made at a sale by the Court in execution of a decree, it is complete, for purposes of limitation, at the date of the purchase, and not at the date of its confirmation by the Court.

Ahmed Kutti v. Ramun Nambudri 99

7. —————, sched. II, art. 139—*Claim for more than twelve years by tenants from year to year of permanent occupancy rights, to knowledge of landlord—Determination of lease:*

A person who has lawfully come into possession of land as tenant from year to year or for a term of years, or as mortgagee, cannot, by setting up, during the continuance of such relation, any title adverse to that of the landlord, or mortgagor, as the case may be, inconsistent with the real legal relation between them—and that however notoriously and to the knowledge of the other party—acquire, by the operation of the law of limitation, title as owner, or any other title inconsistent with that under which he was let into possession. In the case of a mortgage, the title of the mortgagor will be extinguished only at the expiration of the period prescribed for the redemption of the mortgage, and in the case of a lease, the landlord's title can be extinguished only at the expiration of the period prescribed by article 139 of the Limitation Act, and under that article such period will commence to run only when the tenancy is determined.

Seshamma Shettati v. Chichaya Hegude 507

8. —————, sched. II, art. 139—*Malabar Law—Kulkanom lease for indefinite period—Customary law as to duration of lease:*

By the customary law of Malabar, a tenant under a kankanom or kulkanom lease is entitled not to be redeemed or ejected until the expiration of twelve years. But where no time is fixed for the duration of the lease it does not, under the customary law, determine on the expiration of twelve years from its date. A kulkanom lease was granted in 1873, no time being fixed for its determination. In 1899, a suit was brought to recover the land, on payment of the value of improvements, when the defence of limitation was set up. It was contended that the kulkanom lease determined, by the customary law of Malabar, twelve years from its date, namely in 1885, and that as the suit had not been instituted within twelve years of that date, it was barred under article 139 of schedule II to the Limitation Act:—*Held*, that the suit was not barred.

Kelappan v. Madhavi 452

9. —————, sched. II, art. 146-A:

The effect of article 146-A of schedule II to the Limitation Act considered.

S. Sundaram Ayyar v. The Municipal Council of Madura and the Secretary of State for India in Council 635

10. —————, s. 19, sched. II, art. 147—*Suit for foreclosure and sale in the alternative or for sale—Deposition in previous suit of a defendant acknowledging liability—Acknowledgment by agent—Authority of co-mortgagor, merely as such, insufficient—Acknowledgment by managing member insufficient where original dealings have been with all the members of the undivided family:*

By a deed bearing date 4th August 1882, three defendants mortgaged certain immoveable property to plaintiff to secure an advance of Rs. 7,000. On 16th April 1885, the mortgagors executed a written acknowledgment of their liability in respect of that advance. Plaintiff instituted a suit

against the mortgagors, on 21st April 1897, to recover the amount due under the mortgage, and, in default of payment thereof, for sale of the mortgaged property. The plea of limitation was raised. First defendant admitted in evidence that he had, in July 1889, deposed in a suit in another Court, in which he and his co-mortgagors were co-defendants, that their estate was under mortgage; and he also stated (in his evidence in the present suit) that the debt of Rs. 7,000 due to the plaintiff had not been discharged at the time when that deposition was given. Both depositions were signed by first defendant. — *Held*, by Sir ARNOLD WHITE, (J.), and BHASHRAM AYYANGAR, J.—That the suit was not barred as against first defendant. For the purposes of section 19 of the Limitation Act, the acknowledgment relied on must, on the face of it, purport to be that of an existing liability. But the name of the creditor to whom the debt acknowledged is owing, as also the identity of the debt acknowledged in writing, may be proved by parol evidence. *Dara Chand v. Saifraz*, (I.L.R., 1 All., 117), *Uppi Haji v. Hammavan*, (I.L.R., 16 Mad., 366), and *Padmanabhan Nambudari v. Kunhi Kolendan*, (5 M.H.C.R., 320), followed. *Mylapore v. Yeo Kay*, (L.R., 14 I.A., 168; I.L.R., 14 Cal., 801), referred to. *Held* also, that the acknowledgment by first defendant could not affect a co-mortgagor, or save the suit from being barred as against him, there being no ground, apart from his position as co-mortgagor, for the inference that the first defendant acted as an agent duly authorised to make an acknowledgment within the meaning of section 19, explanation 2. An agency, within the meaning of that explanation, cannot be inferred from the mere fact that the person making the acknowledgment is a joint contractor. When a creditor deals, not with the managing member only of an undivided family, but with all the members of the family, as co-obligors, and on that footing enters into a transaction,—thereby avoiding any question as to whether the transaction was really for the benefit of the family,—he cannot rely upon an acknowledgment of the liability, made by one of them, as an acknowledgment duly made on behalf of all the co-obligors, by reason only that the person acknowledging is in fact the managing member of the family consisting of the co-obligors. There may, however, be cases in which that circumstance, coupled with the conduct of the joint contractors, may warrant the conclusion that, as a matter of fact, the managing member was duly authorised to make the acknowledgment on behalf of all. The three essentials of an English mortgage, as defined in section 58 (e) of the Transfer of Property Act, are (1) that the mortgagor should bind himself to repay the mortgage-money on a certain day, (2) that the property mortgaged should be transferred absolutely to the mortgagee, (3) that such absolute transfer should be made subject to a proviso that the mortgagee will reconvey the property to the mortgagor, upon payment by him of the mortgage-money on the day on which the mortgagor bound himself to repay the same. A deed of mortgage recited that the mortgagors “herby mortgage and assign to the mortgagee” the mortgaged property. *Semble*, that (though it was doubtful if such an assignment was really an absolute one) the assignment was sufficient to fulfil the second requisite of an “English mortgage.” The proviso for reconveyance in the deed was as follows:—“Upon repayment to the mortgagee of all sums due to him by the mortgagors the mortgagee shall reconvey the said property to the mortgagors,” etc. — *Held*, (by the same Division Bench), that the transaction could not be regarded as an English mortgage, there being no words importing that the covenant to reconvey was dependent upon the repayment of the mortgage-money being made at the stipulated time and that it should not be enforced in default of repayment at that time. On the question what article of the Limitation Act governs a suit for sale by a mortgagee under such a mortgage deed. *Held*, by the FULL BENCH, that the period of limitation was governed by Article 147. That article applies to a suit by a mortgagee whether it is for foreclosure or sale; and, in the former case, whether the prayer in the plaint is for foreclosure alone, or is coupled with a prayer in the alternative for sale in lieu of a decree for foreclosure. *Ramachandra Rayaguru v. Modha Padhi*, (I.L.R., 21 Mad., 326), and *Girwar Singh v. Thakur Narain Singh*, (I.L.R., 14 Cal., 730), dissented from.

11. ———, art. 179—*Application for execution of decree—Joint decree in favour of three persons—Previous application more than three years before while one decree-holder was a minor—Attainment of majority by that decree-holder within three years of present application—Limitation—"Joint execution-creditors"—"Joint creditors"—"Person entitled"—Civil Procedure Code—Act XIV of 1882, s. 231*

On 30th June 1892, a joint decree was passed in favour of three brothers, who, at the date of the decree, were all minors. On 8th January 1896, the last application for execution, previous to the present one, was made. At this date two of the brothers had attained majority and one was a minor. On 25th February 1899, the present application for execution was presented; the youngest brother having attained majority less than three years before the application. The application of 8th January 1896 was decided or assumed to have been made in accordance with law:—*Held*, that the decree was not capable of execution, either as a joint decree, or to the extent of the interest of the youngest decree-holder. Section 7 of the Limitation Act, 1877, only applies where all the joint execution-creditors were under disability at the time when the period of Limitation began to run. Joint execution-creditors are not "joint creditors," within the meaning of section 8 of the Limitation Act, 1877. The words "a person entitled to institute a suit or make an application" in section 7 of the Limitation Act refer to one who, in his own right, is so entitled, and not to a person who, by a rule of procedure, such as that contained in section 231 of the Code of Civil Procedure, is authorised, with the permission of the Court, to make an application for execution for the benefit of himself and others interested jointly with him in the decree to be executed. *Surja Kumar Dutt v. Arun Chunder Roy*, (I.L.R., 28 Cal., 465), dissented from; *Seshan v. Rajagopala*, (I.L.R., 13 Mad., 236), and *Vigneswara v. Bayayya*, (I.L.R., 16 Mad., 436), approved.

Periasami v. Krishna Ayyan 131

MADRAS DISTRICT MUNICIPALITIES ACT—ACT IV OF 1884 as amended by ACT III OF 1897, s. 3, cl. 27—"Street"—Effect of vesting in Municipality—Obstruction by owner of property abutting on street—Suit for injunction to prevent interference by Municipality—Limitation Act—Act XV of 1877, sched. II, art. 146-A:

When a street is vested in a Municipal Council, such vesting does not transfer to the Municipal authority the rights of the owner in the site or soil over which the street exists. It does not own the soil from the centre of the earth *usque ad cælum*, but it has the exclusive right to manage and control the surface of the soil and so much of the soil below and of the space above the surface as is necessary to enable it to adequately maintain the street as a street. It has also a certain property in the soil of the street which would enable it as owner to bring a possessory action against trespassers. The effect of article 146-A of schedule II to the Limitation Act considered. *Municipal Commissioners for the City of Madras v. Sarangapani Moodahar*, (I.L.R., 19 Mad., 154), commented on.

Sundaram Ayyar v. The Municipal Council of Madura and the Secretary of State for India in Council 635

2. ———, s. 63(3)—*Madras District Municipalities Amendment Act—Act III of 1897, s. 49—"Lands used solely for agricultural purposes"—Liability to tax:*

By sub-section (3) of section 63 of the Madras District Municipalities Act, 1884, as amended by the Madras District Municipalities Amendment Act, 1897, lands used "solely for agricultural purposes" are exempted from the enhanced rates of taxation that may be imposed in certain cases under that sub-section:—*Held*, that lands on which potatoes, grain, vegetables, &c., are grown, as well as pasture lands, are used "solely for agricultural purposes", within the meaning of the sub-section.

King-Emperor v. Alexander Allan 627

3. ————— sched. A—
*Shopkeeper or trader—District Forest-officer—Depot for sale of forest produce
 conducted by representative of Government—Liability to taxation :*

A District Forest-Officer, who, as the representative of Government, conducts, a depot for the sale of forest produce, is not liable to taxation under schedule A of the Madras District Municipalities Act, 1884, as a "trader" or "shopkeeper."

The Municipal Council of Mangalore v. The Secretary of State for India in Council 747

- MALABAR LAW—***Liability of improvements made by sub-tenants of kanomdar for rent due by kanomdar to jenmi—Transfer of Property Act—Act IV of 1882, s. 85 Appral- Parties—Practice :*

A jenmi having sued the kanomdar and his sub-tenants, obtained a decree for redemption and possession on certain terms. The sub-tenants, objecting to some of the terms, appealed, but they did not join the kanomdar, to whose prejudice the terms were modified on the appeal:—*Held*, that the kanomdar was a necessary party and that the decree made by the Appellate Court in his absence must be set aside, as no reasonable excuse was forthcoming for the omission to make him a party. *Ramunni Panikar v. Sankara Panikar*, (Second Appeal No. 1476 of 1889 (unreported)), and *Vedapuratti v. Govinda Menon*, (Second Appeal No. 51 of 1892 (unreported)), followed. Whether improvements made by the sub-tenants of a kanomdar are liable for rent due by the kanomdar to the jenmi—*Quære. Achuta v. Kali*, (I.L.R., 7 Mad., 545) and *Prensa Menon v. Shamu Patter*, (I.L.R., 21 Mad., 138), referred to.

Vedapuratti v. Avara 568

2. —————*Kuikanom lease for indefinite period—Customary law as to duration of lease—Limitation Act—Act XV of 1877, sched. II, art. 139 :*

By the customary law of Malabar, a tenant under a kanom or kuikanom lease is entitled not to be redeemed or ejected until the expiration of twelve years. But where no time is fixed for the duration of the lease it does not, under the customary law, determine on the expiration of twelve years from its date. A kuikanom lease was granted in 1873, no time being fixed for its determination. In 1899, a suit was brought to recover the land, on payment of the value of improvements, when the defence of limitation was set up. It was contended that the kuikanom lease determined, by the customary law of Malabar, twelve years from its date, namely in 1885, and that as the suit had not been instituted within twelve years of that date, it was barred under article 139 of schedule II to the Limitation Act:—*Held*, that the suit was not barred.

Kelappan v. Madhavi 452

3. —————*Sarvasvadanam marriage—Devolution of property of wife's illom on her decease without issue—Nambudnes—Self-acquisitions :*

First defendant, who was the nephew of S, had executed a hypothecation bond over certain property in plaintiff's favour, subject to a prior mortgage which had been executed by his uncle in favour of P. The assignee of a decree against S then caused the properties to be attached and proclaimed for sale, when plaintiff prepared a claim, which was allowed. At a sale which took place subsequently, N purchased the property subject to P's and plaintiff's debts. N then assigned his right to defendants Nos. 2 to 8, who paid P the amount of his debt, but did not pay plaintiff. Plaintiff now sued all the defendants for the amount due under his bond, and claimed that the mortgaged property should be sold in default of payment. Defendants contended that the property was not the jenmam of first defendant's illom, their case being that first defendant's senior paternal uncle, S, had obtained it as a gift from his wife's illom, and that, in consequence, his nephew, first defendant, had no right to execute a mortgage over it:—*Held*, that in the face of this admission it was impossible for defendants to contend that, on the death of S's Sarvasvadanam

wife, S lost all his rights over the property of her illom. Whether, under the customary law governing the Nambudries of Malabar, self-acquisitions pass, at death, to the immediate heirs of the acquirer rather than to his illom.—*Quære*. Whether, in the case of a Sarvasadanam marriage, the wife dying without issue, the property of her illom vests in her husband by virtue of his affiliation under that marriage. — *Quære*.

Chemnautha Attekunnath Lakshmi Amma v. Palakuzhu Thuppan Nambudiri

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MORTGAGE—Construction of deed—Mortgage *quâ* zemindar Right of mortgagor in village not held *quâ* zemindar — Absence of express provision in deed charging such right—Not comprised in mortgage :

By a deed of mortgage, dated 22nd October 1892, a zemindar mortgaged to plaintiff his entire zemindari which was recited as yielding a certain annual income, together with the zemindar's "entire right and income and the kattutadis on enfranchised inams." The schedule specified by name the villages constituting the zemindari, one of these being the village of Sabuliya. The only right, title and interest possessed by the zemindar in this village, (which was an inam village of certain Payaks), was to the annual payment by the inamdars of a fixed kattubadi, and the amount of this kattubadi was all that was included in the approximate annual income specified in the schedule. At the date of the mortgage to plaintiff, the zemindar also possessed a mortgage right over this village, he being the assignee of a mortgage which had been executed by the Payaks, (the inamdars), in 1874, the assignment having been made to him in 1889. In a suit brought against the zemindar in 1898 by plaintiff, on his mortgage, plaintiff contended that the deed operated to assign to him, by way of mortgage, not only the zemindar's right to kattubadi in respect of the village of Sabuliya, but also the mortgage right possessed by the zemindar over that village. — *Held*, that the zemindar's mortgage right over the village Sabuliya was not comprised in the mortgage. *Rool v. Lord Kensington*, (25 L.J., (Ch), 795), referred to.

Bhmaraju Chetti v. Sri Kunja Behari Gajendra Devu

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MUHAMMADAN LAW—Dower—Suit on a mortgage executed by judgment-debtor—Decree for sale—Decease of judgment-debtor—Sale by Court—Attempt by purchaser to obtain possession—Resistance by widow on ground that her dower formed a charge on the land :

A widow's claim for dower under Muhammadan Law is not a lien on her husband's property, such as is obtained by a mortgage, but ranks on a par with ordinary debts.

Ameer Ammal v. Sankaranarayanan Chetty

658

NUISANCE—Opening of burial and burning ground—"Convenient and fitting place"—Smoke from burning ground—Actionable nuisance—Public body—Protection :—See CITY OF MADRAS MUNICIPAL ACT (MADRAS)

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PENAL CODE ACT XLV OF 1860, ss. 109, 161, and 384—Criminal Procedure Code—Act V of 1898, ss. 233, 234, 235 (1)—Majoinder of charges—Trial by jury on indictment in which charges have been wrongly joined—Irregularity in criminal proceedings—Count charging continued acts of abetment of extortion and bribery—Evidence Act—1st I of 1872, s. 167 :

The appellant was tried at the Criminal Sessions of the High Court, and convicted, on an indictment the first count of which contravened the provisions of sections 233 and 234 of the Code of Criminal Procedure (which provide that every separate offence shall be charged and tried separately, except that three offences of the same kind may be tried together in one charge if committed within the period of one year); and did not fall within the provisions of section 235(1) (which provides that if, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried at one trial for, every such offence). On a case certified

under article 26 of the Letters Patent and heard by the Full Court, it was held by the majority of the Court that the union of the first count with the others made the whole indictment bad for misjoinder, but that it was open to them to strike out the first count, rejecting the evidence with regard to it, and deal with the evidence as to the remaining counts of the indictment. This was done with the result that the conviction was upheld on one count only, the sentence being reduced.—*Held*, by the Judicial Committee that the disregard of an express provision of law as to the mode of trial was not a mere irregularity such as could be remedied by section 537 of the Criminal Procedure Code. Such a phrase as "irregularity" is not appropriate to the illegality of trying an accused person for more different offences at the same time, and those offences being spread over a longer period than by law could have been joined together in one indictment. *Smurthwaite v. Hannay*, ([1894], A.C., 494), referred to. In the matter of *Abdur Rahman*, ((1900) I.L.R., 27 Cal., 839), dissented from. Nor could such illegal procedure be amended by arranging afterwards what might or might not have been properly submitted to the jury. To allow this would leave to the Court the functions of the jury, and the accused would never have been really tried at all upon the charge afterwards arranged by the Court. The trial having been conducted in a manner prohibited by law was held to be altogether illegal and the conviction was set aside.

Subrahmanya Ayyar v. King-Emperor

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2. _____, s. 143—*Unlawful assembly—Defence by accused persons of property in their possession.*

Paddy belonging to a society, to which the first accused belonged, was stored in a granary in a street. It was found as a fact that this paddy had been in the possession of the first accused for some time prior to 5th November 1899, and was in his possession on that date. Complainant, on 5th November 1899, attempted, as treasurer of the society, to forcibly take possession of the paddy with his servants, whereupon all the accused resisted him, and maintained the possession of the first accused, some blows being struck. On a charge being preferred against the accused for rioting.—*Held*, that no offence had been committed.

King-Emperor v. Ayya Annasawmy Aiyar

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PENAL CODE—ACT XLV OF 1860, ss. 417, 511, 468—*Attempting to cheat and forgery—Application to University for duplicate certificate by person not entitled—Offence:*

S. held a Matriculation certificate which had been issued to him by a University. C. had failed to pass the Matriculation Examination. The Registrar of the University received a letter purporting to be signed by S., stating that his certificate had been lost and requesting that a duplicate might be issued. Enclosed with the letter was what purported to be a certificate by the head-master of a local school, corroborating the statement as to the loss and supporting the application for the issue of a duplicate. This document had not, in fact, been written by the head-master, and S. had not in fact lost his Matriculation certificate. C. was charged with cheating and forgery to commit cheating. The Deputy Magistrate found, on the evidence, that the writer of the application for a duplicate certificate was the accused, and convicted and sentenced the accused on both charges. The Sessions Judge, on appeal, altered the offences to those of attempting to cheat and forgery to commit cheating and reduced the sentence. Subject to these modifications he dismissed the appeal. On a revision petition being filed in the High Court:—*Held*, that the charge of cheating must fail, inasmuch as there was no proof that the deception practised by the accused on the Registrar of the University had caused harm or damage to him or to the University which he represented. Nor was it shown that the accused, in applying for the duplicate certificate, had any intention of causing wrongful gain to himself or wrongful loss to the University, to whom he had paid a fee greater than the cost price of the certificate. The charge of forgery also failed, for, assuming

that accused had fabricated the head-master's certificate it was not shown that he had done so fraudulently or dishonestly and with intent to cause damage or injury to the public or to any one. The question before the court was not as to his intended use of the certificate subsequently. Even if he had such an intention this mere preparation did not amount to an attempt to commit an offence within the meaning of section 511 of the Indian Penal Code.

King-Emperor v. Srinivasan 726

PENAL CODE—ACT XLV OF 1860, s. 424—Dishonest removal of property to avoid distraint—Distraint for arrears of rent under the Rent Recovery Act—Absence of presumption in favour of its legality—Onus of proof on prosecution to prove legality—Conviction in absence of such proof—Illegality.

Where a distraint is made under the Rent Recovery Act for arrears of rent, there is no presumption that it is legally made, and if persons are charged with having dishonestly removed property to avoid it, the prosecution must prove that it was a legal distraint. In the absence of such proof, persons who have resisted the distraint or have removed their property to avoid it, cannot be convicted of an offence, inasmuch as they had a right of private defence of their property unless the distraint was legal.

King-Emperor v. Gopalasamy 729

PLAINT—Sufficient disclosure of cause of action—Limitation Act—Act XV of 1877, sched. II, art. 116—"Contract in writing registered" signed by one party thereto.

During the course of certain litigation in which B was suing A on a promissory note a compromise was arrived at under which A undertook to execute a mortgage in favour of B and, in consideration thereof, B undertook to withdraw an appeal which was pending at the time. The mortgage was executed, and the undertaking to withdraw the appeal was embodied in the mortgage deed, which was registered, but signed only by A. B, in breach of his undertaking, permitted the appeal to proceed, and obtained a decree on 20th November 1891, which he subsequently executed against A, recovering the value of the promissory note upon which he had originally sued. He also retained the mortgage which had been executed in the compromise. A now sued to recover from B the amount which B had collected under the decree, stating the cause of action as having arisen on the date of that collection, namely, 29th October 1893, when it was contended that the suit was not maintainable inasmuch as the decree had not been set aside, and that even if treated as a suit for damages for breach of the undertaking to withdraw the appeal, it was barred, as the date of the breach was the date of the decree, (viz., 20th November 1891), which had been wrongly obtained, and this suit had not been brought within three years from that date, the plaint having been filed on 14th September 1896:—*Held*, that inasmuch as all necessary allegations were made in the plaint, the contract and its breach being alleged, and as the defendant understood what the claim against him was, the plaint sufficiently disclosed a cause of action for damages for the breach of contract. *Held also*, that the undertaking in the mortgage was "an agreement in writing registered" within the meaning of article 116 of the Limitation Act and that consequently the claim was not barred. The fact that the instrument was not signed by B did not take the case out of the operation of that article.

Kotappa v. Vallu Zemindar 80

PLEADER—Authority to bind client—Power of pleader to abandon issue—Suit for partition—Power of Court to refuse to raise issue of limitation—Possession of and liability to account for joint family property—Failure to disclose possession of joint property:

A vakil's general powers in the conduct of a suit include the power to abandon an issue which, in his discretion, he thinks it inadvisable to press. In a suit for partition against his brother the plaintiff alleged that the immovable family property was joint, and that the defendant had been,

during the minority of the plaintiff, in possession as manager on behalf of himself and the plaintiff. The defendant stated that the property was by family usage impartible and held by the senior member of the family, and denied that he had held it on behalf of the plaintiff and himself. At the hearing, after the other issues had been settled, the defendant asked to be allowed to raise an issue as to limitation on the ground that he had been in possession adversely to the plaintiff for more than 12 years, but the Judge refused to allow the issue to be raised.—*Held*, that no question of limitation necessarily arose on the pleadings and it was not obligatory on the Judge to direct an issue on that point. Where the defendant admitted the existence of property as joint family property and could not charge the plaintiff with its possession, he was, as manager of the family, rightly held primarily responsible, and bound to account for it. Where the plaintiff sought a complete partition of the whole of the family property and the plaintiff expressed his willingness to bring into hotchpot certain property the possession of which he had not admitted in his plaint, but which was afterwards found liable to partition,—*Held*, that no question arose as to his suit being one for partial partition, and therefore unmaintainable.

Venkata Narasimla Naidu v. Bhaskarulu Naidu

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PRACTICE—Decree awarding costs as against two defendants—Payment by one defendant—Appeal by both defendants jointly to High Court against decree—Death of defendant who paid during pendency of appeal—Prosecution of appeal on behalf of survivor alone—Reversal of decree by High Court—Claim by legal representative of deceased defendant for restitution of amount paid as costs.

A decree was obtained in a District Court against two defendants, by which they were ordered to deliver up certain property and to pay the costs of the suit. These costs were in fact paid by the first defendant. An appeal was preferred by both defendants jointly to the High Court, but the first defendant died while it was pending. The legal representative of the deceased defendant was not brought on the record, and when the appeal came on for hearing it was proceeded with by the second defendant on his own behalf. The result was that the High Court reversed the decree of the District Court, but the High Court decree recited that the appeal had been prosecuted on behalf of the surviving defendant alone. The son and legal representative of the first defendant now presented a petition in execution and claimed that the whole decree of the District Court had been reversed and that in consequence he was entitled to restitution of the costs which had been realised by the plaintiffs (counter-petitioners), from the deceased first defendant.—*Held*, that as it was expressly recited in the High Court decree that the appeal had been prosecuted on behalf of the surviving defendant alone, the decree must be construed as limited to his interests. And that the decree of the Original Court must be regarded as still in force against the first defendant, and his heir, the petitioner, was, therefore, not entitled to restitution of the costs levied from his father under that decree until he had successfully prosecuted the appeal of his father which was still pending.

Natesa Ayyar v. Annasami Ayyar

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PROVINCIAL SMALL CAUSE COURTS ACT—ACT IX OF 1887, s. 15, sched. II, cl. 35 (j)—Compensation for illegal distress—Civil Procedure Code—Act XIV of 1882, s. 586—Second appeal—Limitation—Rent Recovery Act (Madras)—Act VIII of 1865, s. 78—Cause of action complete on date of illegal distress:

A plaint alleged that plaintiffs had for long cultivated certain land as tenants under defendant, that they had raised a crop of paddy measuring about 6 garces and stored it in three heaps on the land, that one of the plaintiffs had paid all the cist that was due to defendant, but that defendant had taken unlawful possession of two of the heaps of paddy measuring about 5 garces under the pretext that he had distrained them. The prayer was for an order directing defendant to deliver to plaintiffs about 5 garces of grain worth Rs. 250 at Rs. 50 per garce in respect of the two heaps of paddy of which he had taken unlawful possession. The distraint was made on 25th January 1898, and the suit was instituted on 25th July of the same

year.—*Held*, that the suit was in substance one for compensation for illegal distress or attachment and not for the recovery of specific property, and that, in consequence, it was not a suit of the nature cognizable by a Court of Small Causes, and a second appeal lay. *Held* also, that the suit was barred. The wrong was complete and the cause of action arose when the unlawful distress was made. *Yamuna Bai Rani Sahiba v. Solana Karamdan*, (I L R, 24 Mad., 339), distinguished.

Pamu Sanyasi v. Zemindar of Jayapur

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PROVINCIAL SMALL CAUSE COURTS ACT—ACT IX OF 1887, sched. II, art. 31—
Jurisdiction—Dispossession of plaintiff from immovable property by defendant under decree—Receipt by defendant of profits—Decree reversed on appeal—Suit by plaintiff to recover profits wrongfully received by defendant while in possession—Suit not cognizable by Small Cause Court

Defendant obtained a decree against plaintiff for possession of certain immoveable property, in execution of which defendant took possession of the property. Plaintiff appealed against the decree, which was reversed. While defendant was in possession he received profits from the property amounting to a sum less than Rs 500. Plaintiff now sued in the Court of Small Causes to recover this sum as profits which had been wrongfully received by defendant.—*Held*, that the suit was not cognizable by a Court of Small Causes. *Subba Rao v. Sitaramayya*, (I.L.R., 24 Mad., 118), *Seshagiri Ayyar v. Marakathammal*, (I L R., 22 Mad., 196), and *Kunjo Behary Singh v. Madhub Chundra Ghose*, (I.L.R., 23 Cal., 884), considered.

Savarimuthu v. Aithumusu Rowthar

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REGISTRATION—Document Collateral to a permanent lease of immovable property—Registration Act—Act III of 1877, s. 17—Transfer of property Act—Act IV of 1882, s. 107—Evidence Act—Act I of 1872, s. 92—Right of suit by assignee of agreement—assignment of property to trustee—Construction of trust deed—Claims “now due owing or payable”.

An agreement to pay Rs 500 a month to a lessor in consideration of receiving from him a permanent lease of portions of his zemindari, which agreement was come to before, but reduced to writing after, the execution of the lease, was *held* to be not affected by section 92 of the Evidence Act, nor to require registration either under the Registration Act, section 17, or the Transfer of Property Act, section 107, where it was not inconsistent with the lease, its provisions formed no part of the holding under the lease, the payment bargained for was no charge on the property, and it was not rent or recoverable as rent, but a mere personal obligation collateral to the lease:—*Held* also that the lessor's rights under the agreement did not pass under a settlement subsequently executed by him for the benefit of his son, by which he assigned to a trustee his zemindari with its incidents, and also “all the outstanding debts, arrears of rent, mesne profits, claims, demands, and sums of money of whatsoever description, now due owing or payable to the settlor on any account whatsoever, and all rights to prosecute any suit or other proceedings existing in favour of the settlor at the date of these presents . . . except and always reserving to the settlor all outstanding debts, arrears of rent and other claims and demands payable and to become payable to the settlor, and all rights to prosecute any suit or other proceedings now existing, etc.” The use in an Indian document of the words “now due owing or payable” in defining the claims transferred, coupled with the words that follow restricting the transfer of rights of suit in respect of such claims to those existing at the date of the deed, showed that rights of the nature of those in the agreement, accruing as they did after the date of the trust deed, were not intended to pass under it, and this view was strengthened by the employment of the phrase “demands payable and to become payable” in the exception and reservation which followed. Where, therefore, the lessor had, after execution of the trust deed, assigned his rights under the agreement:—*Held*, that the assignee could maintain a suit upon it to recover the amount due.

Subramanian Chettiar v. Arunachalam Chettiar

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REGISTRATION ACT—ACT III OF 1877, s. 17—Deed of gift of immoveable property—Registration by legal representative after death of donor—Validity of gift:

The voluntary registration of a deed of gift by the legal representative of the donor has the same effect as its voluntary registration by the donor himself in his life time.

Meryyala Nadan v. Anjalay 672

2. —————, s. 17—Withdrawal petition setting out terms of compromise filed in Court but not registered—Subsequent suit for land referred to in the compromise—Necessity for registration:

In 1893, plaintiff sued defendants for possession of certain immoveable property. The parties then entered into a compromise by the terms of which defendants were to give plaintiff a portion of the property sued for. They then filed a petition in Court setting out the agreement at which they had arrived and asking that the suit might be withdrawn. The Court thereupon ordered the suit to be struck off the file, and made an order as to costs. The agreement was never registered. Plaintiff, relying on the agreement, now sued to have it established and to recover possession of the property to which he was entitled under it — *Held*, that the agreement should have been registered and that the suit brought on it must fail.

Muthanna v. Venkata Ratnam 553

3. —————, ss. 18, 50—Document of which registration is optional—Priority of subsequent registered document over prior unregistered document—Notice of prior document—Onus of alleging and proving notice

To check fraud, priority is not given by the Courts, in cases to which section 50 of the Registration Act applies, to the holder of a later registered mortgage, if he, at the time when he obtained his mortgage, had notice of an earlier one. But the onus lies on the party alleging such knowledge or notice, to aver it in his pleadings and to prove it.

Chinnappa Reddi v. Manichavasagam Chetti 1

RENT RECOVERY ACT—(MADRAS ACT) VIII OF 1865, s. 10—Suits to enforce acceptance of patta—Necessity for tender of patta after judgment where patta originally tendered is either upheld or amended:

Where a tenant has been ordered by a judgment passed under section 10 of the Rent Recovery Act to accept the patta which has been tendered to him, or such amended patta as the judgment declares ought to be offered to him, and to execute a muchilika in accordance with it, the tenant is not liable to be ejected under section 10 unless the landlord proves that within a reasonable time after the date of the judgment, not exceeding ten days therefrom, he tendered to the tenant the patta as approved, or as amended by the Court, and that the tenant did not accept the same and execute a muchilika before the expiration of the said period of ten days *Court of Wards v. Dammalinga*, (I.L.R., 8 Mad, 2), commented on.

Shanmuga Mudaly v. Palnati Kuppu Chetty 613

2. ——————Purchase at Court sale of former tenant's interest in land—Liability of purchaser for rent as from date of confirmation of sale

Defendant had purchased at a Court sale the interest of a former tenant in certain land in a zemindari. The sale was confirmed on 31st March 1900, and possession was given to defendant, on 11th May 1900. The landlord now sued to enforce the acceptance by defendant of patta for fash 1309, being the year commencing on 1st July 1899 and ending on 30th June 1900. By the terms of the muchilikas which had been executed by the former tenant, rent was payable in four equal instalments on 1st October, 1st February, 1st April and 1st May:—*Held*, that the defendant

was liable for the instalments which fell due subsequently to the confirmation of sale, namely, on 1st April and 1st May 1900. Also, that it was immaterial, (in regard to his liability for rent, when he recovered actual possession of the land.

Ramasami Mudaliar v. Annadorai Ayyar 154

3. _____, ss. 10, 69—*Adjudication that plaintiff has failed to prove default by defendant*—"Judgment"—*Appeal* :

An order passed under section 10 of the Rent Recovery Act which amounts to an adjudication that the plaintiff has failed to prove default on behalf of the defendant, is a judgment within the meaning of section 69 of the Act, and an appeal lies therefrom. *Narasimhaswami v. Lakshamma*, (I.L.R., 22 Mad., 436), followed.

Venkata Papya Rao v. Venkata Subbayya 453

4. _____, ss. 15, 17, 18—*Statement of place in which distrained property is kept*—"The property is with the distrainer"—*Sufficiency*—*Maintainability of suit* :

In a suit instituted under section 18 of the Rent Recovery Act to set aside a distraint on the ground that it had been illegally carried out, plaintiff complained that the authority to distrain did not contain the particulars required by section 15 of the Act. The property, which consisted of some small jewels was described as being "with the distrainer";—*Held*, that with regard to property of this description the statement was sufficient. Whether the failure to state the place where property which has been distrained is kept is a ground for a suit under section 18 of the Rent Recovery Act to set aside the distraint.—*Quære*.

Viraraghava Ayyangar v. Kanagavalli Ammal 503

REVENUE RECOVERY ACT—(MADRAS ACT) II OF 1864, ss. 38, 39—Sale of land for arrears of revenue—Proclamation of purchaser's name—Subsequent contention that purchase was benami—Validity :

Where land has been sold for arrears of revenue under the Revenue Recovery Act of 1864, and the name of the purchaser has been published in pursuance of section 39 of that Act, the effect of such proclamation is to vest the property absolutely in the purchaser as there named, and it will not be open to any one to contend subsequently that the purchaser was a benamidar and that the real purchaser was some one else. *Tirumalayappa Pillai v. Swami Naiker*, (I.L.R., 18 Mad., 469), and *Subbarayar v. Asirvathu Upadesayya*, (I.L.R., 20 Mad., 494), explained.

Narayana Chettiar v. Chokkappa Mudaliar 655

2. _____, s. 42—*Advance to owner of two pieces of land—Security taken on one alone—Sale of the other piece in respect of advance—Validity*—*Land Improvement Loans Act—Act XIX of 1893, s. 7, cl. 1 (a)* :

N held two pieces of land on patta and obtained a loan from Government, under Act XIX of 1893, for the improvement of one of them, namely, No. 315. The other piece, namely, No. 105-B, was not made collateral security for the loan. Default having been made in repayment of the loan, piece No. 315 was, in 1894, attached and put up for sale and (as there were no bidders) bought in by Government. In 1895, N sold the other piece of land, No. 105-B, to plaintiff, but the patta was not transferred. In 1896, No. 105-B was attached by Government in respect of N's unpaid loan. Plaintiff objected to its sale, claiming title to it as purchaser, and in 1897, both N and plaintiff applied for a transfer of the patta to plaintiff. The transfer was not made as the loan to N had not been repaid. The land was ultimately sold by Government to first defendant, whereupon plaintiff brought this suit for a cancellation of that sale :—*Held*, that plaintiff was entitled to the relief claimed.

Channasami Mudali v. Tirumalai Pillai and the Secretary of State for India 572

3. *Courts Act—Art IX of 1887, s. 15, sched. II, cl. 35 (j)—Compensation for illegal distress Civil Procedure Code—Act XIV of 1882, s. 586—Second appeal—Limitation—Cause of action complete on date of illegal distress :*

A plaint alleged that plaintiffs had for long cultivated certain land as tenants under defendant, that they had raised a crop of paddy measuring above 6 garces and stored it in three heaps on the land, that one of the plaintiffs had paid all the cist that was due to defendant, but that defendant had taken unlawful possession of two of the heaps of paddy measuring about 5 garces under the pretext that he had distrained them. The prayer was for an order directing defendant to deliver to plaintiffs about 5 garces of grain worth Rs. 250 at Rs. 50 per garce in respect of the two heaps of paddy of which he had taken unlawful possession. The distraint was made on 25th January 1897, and the suit was instituted on 26th July of the same year:—*Held*, that the suit was in substance one for compensation for illegal distress or attachment and not for the recovery of specific property, and that, in consequence, it was not a suit of the nature cognizable by a Court of Small Causes and a second appeal lay.—*Held also*, that the suit was barred. The wrong was complete and the cause of action arose when the unlawful distress was made. *Yamuna Bai Rani Sahiba v. Solayya Kavundan*, (I.L.R., 24 Mad, 339), distinguished.

Pamu Sanyasi v. Zemindar of Jayapur 540

SALE OF GOODS—*Promissory note accepted by vendor for their value—Suit for the price of goods sold and delivered and not on the notes—Maintainability—Partnership—Promissory note signed by one of two partners for the price of goods purchased—Suit by vendor against both partners based on the original contract—Liability of both partners :*

Plaintiffs had sold and delivered opium to defendants on different occasions, taking a promissory note at each sale for the value of the parcel sold. These promissory notes had been signed by one of two partners, they were made payable on demand to plaintiffs or their order and they had not been negotiated. Plaintiffs now sued all the partners for the amount due, framing the suit as one for the price of goods sold and delivered and not basing it on the notes. The partner who had not signed the notes contended that the suit did not lie as framed, and that it should have been brought on the notes and not for the goods sold and delivered:—*Held*, that plaintiffs were entitled to sue for the price of the goods sold and delivered, and that both of the partners were liable.

Dargavarapu Samapu v. Rampatapu 580

SPECIFIC RELIEF ACT—ACT I OF 1877, s. 9—*Suit for land based on title—Claim of title set up in defence—Suit treated by Court partly as summary suit for possession under s. 9 and partly as a suit based on title—Rights of parties to have question of title tried and decided—Practice :*

Plaintiff sued to eject defendants from certain land, claiming title to it by purchase, and alleging that he had been forcibly dispossessed by defendants. The defendants denied both plaintiff's title and possession and set up title in themselves and alleged that they had long been in possession. The District Judge found that plaintiff had failed to prove a title by purchase, but had shown that he had been dispossessed otherwise than by due course of law, by defendants, within six months prior to the institution of the suit. He considered that section 9 of the Specific Relief Act applied and declared plaintiff entitled to possession, but dismissed the suit in so far as it claimed to have plaintiff's title established:—*Held*, that inasmuch as the suit had not been brought under the special provisions of the Specific Relief Act, but was based on plaintiff's superior title, a claim to title being also set up in defence, the issue concerning title should have been tried. The suit ought not to have been treated partly as a suit under section 9 and partly as based on plaintiff's title. *Ram Harakh Rai v. Sheodihal Joti*, (I.L.R., 15 All., 384), not followed.

Ramasawmi Chetti v. Paraman Chetti 448

2. _____, s. 42—*Suit for declaration of invalidity of will on ground that it bequeathed family property—No claim for partition. Maintainability—Hindu Law—Existence of leases over family property no bar to partition:*

Plaintiff sued his brother, his sister and his brother's son for a declaration of invalidity of a will which purported to have been executed by his late father, by which certain property had been bequeathed to one of the defendants. Plaintiff claimed that the property was ancestral; that he was entitled to his share in it by right of survivorship and that the testator had no power to bequeath it. No claim was made in the plaint for partition of the property, which was stated to be in the possession of tenants under leases granted by plaintiff and first defendant—*Held*, that the suit was barred by the proviso to section 42 of the Specific Relief Act, inasmuch as plaintiff might have sued for partition of his share in what he claimed to be the joint family property. Even though the land were in the possession of tenants entitled to continue in occupation under subsisting leases, that would be no bar to a partition of the property among the members of the family.

Suryanarayana-murti v. Tammanna

504

- STAMP ACT—ACT II OF 1899, s. 5, sched. I, art. 31—*Lease for three years containing covenant by lessor to renew at option of lessee for further term of one or two years from expiration of original term—Stamp duty—Not an instrument comprising or relating to several distinct matters*

A lease for three years at a specified rent containing a covenant on the part of the lessor to renew it, at the option of the lessor, for a further period of one or two years from the expiration of the original term, is not an instrument comprising or relating to several distinct matters within the meaning of section 5 of the Stamp Act, 1899. Such an instrument contains but one contract, namely, a demise. The option to renew is ancillary to and forms part of the consideration for entering into the lease.

Reference under Stamp Act, s. 57

3

2. _____, ss. 32, 57—*Reference to High Court—Determination by Collector as to duty leviable final—"Case"—Jurisdiction of High Court:*

An adjudication by a Collector, under the powers conferred on him by section 31 of the Stamp Act, 1899, as to the duty with which an instrument is chargeable is, by section 32 of that Act, final, and such a case cannot be referred by the Revenue authorities to the High Court under section 57 of the Stamp Act for an adjudication.

Reference under Stamp Act, s. 57

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3. _____, s. 33—*Seizure of documents under search-warrant—Document that "comes" before a Magistrate:*

Complaint having been made against a person for having committed offences under sections 64 (c) and 68 (c) of the Stamp Act of 1899, the Magistrate issued a search warrant, under which certain documents were seized and impounded under section 33 (2) of the Act. On its being contended that his action in impounding them was illegal, because the documents did not come before him in the performance of his functions within the meaning of section 33 (1)—*Held*, that the word "comes" is sufficiently wide to include the production of documents under a search-warrant.

King-Emperor v. Balu Kuppayyan

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4. _____, s. 57—*Certificate by Deputy Collector under s. 40 (1) (a) exempting documents from stamp duty—Reference by Board of Revenue to High Court—Jurisdiction of High Court to decide the question:*

A Sub-Registrar, acting under section 33 of the Stamp Act, 1899, impounded two documents which had been produced before him for

registration, and, under section 28 (2), forwarded them to the Deputy Collector, who, under section 40 (1) (a), certified that they were exempt from stamp duty. The Inspector-General of Registration disagreed with the opinion formed by the Deputy Collector and reported the matter to the Board of Revenue for orders. The Board of Revenue referred the question as to the stamp duty, if any, payable on the documents to the High Court, under section 57 of the Act.—*Held* (the Chief Justice dissenting), that the High Court had no jurisdiction to decide the question.

Reference under Stamp Act, s. 57

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STATUTES :

24 & 25 VICT., CAP. 67, s. 42 .

See CITY OF MADRAS MUNICIPAL ACT (MADRAS) AND INDIAN COUNCILS ACT (1861).

11 & 12 VICT., CAP. 21, s. 23 :

See LETTERS PATENT AND CIVIL PROCEDURE CODE (1).

44 & 45 VICT., CAP. 58, ss. 136, 151

See ARMY ACT (1881).

58 VICT., CAP. 7, s. 4 :

See ARMY ACT (1881)

SUCCESSION CERTIFICATE ACT—ACT VII OF 1889, ss. 10, 19—*Order extending certificate*—" *Order granting a certificate*"—*Appeal*

The extension of a certificate under section 10 of the Succession Certificate Act to additional debts is not the grant of a certificate so as to give a right of appeal under section 19 of that Act against the extension.

Venkateswarulu v. Brahmaravulu Raja Krishna

634

TRANSFER OF PROPERTY ACT—ACT IV OF 1882, s. 58 (c)—"English mortgage"—

Covenant for reconveyance not limited to time stipulated for repayment of mortgage-money—Limitation Act—Act XV of 1877, s. 19, sched. II, art 147—Suit for foreclosure and sale in the alternative or for sale—Deposition in previous suit of a defendant acknowledging liability—Acknowledgment by agent—Authority of co-mortgagor, merely as such, insufficient—Acknowledgment by managing member insufficient where original dealings have been with all the members of the undivided family :

By a deed bearing date 4th August 1882, three defendants mortgaged certain immoveable property to plaintiff to secure an advance of Rs. 7,000. On 16th April 1885, the mortgagors executed a written acknowledgment of their liability in respect of that advance. Plaintiff instituted a suit against the mortgagors, on 21st April 1897, to recover the amount due under the mortgage, and, in default of payment thereof, for sale of the mortgaged property. The plea of limitation was raised. First defendant admitted in evidence that he had, in July 1889, deposed in a suit in another Court, in which he and his co-mortgagors were co-defendants, that their estate was under mortgage, and he also stated (in his evidence in the present suit) that the debt of Rs. 7,000 due to the plaintiff had not been discharged at the time when that deposition was given. Both depositions were signed by first defendant.—*Held*, by Sir ARNOLD WHITE, C.J., and BHASHYAM AYYANGAR, J.—That the suit was not barred as against first defendant. For the purposes of section 19 of the Limitation Act, the acknowledgment relied on must, on the face of it, purport to be that of an existing liability. But the name of the creditor to whom the debt acknowledged is owing, as also the identity of the debt acknowledged in writing, may be proved by parol evidence. *Datta Chand v. Sarfraz*, (I.L.R., I All., 117), *Uppu Haji v. Mammavan*, (I.L.R., 16 Mad., 366), and *Padmanabhan Nambudri v. Kunhi Kolendan*, (5 M.H.C.R., 320), followed. *Mylapore v. Yeo Kay*, (L.R., 14 I.A., 168; I.L.R., 14 Cal., 801), referred to. *Held* also, that the acknowledgment by first defendant could not affect a co-mortgagor, or save the suit from being barred as against him, there being

no ground, apart from his position as co-mortgagor, for the inference that the first defendant acted as an agent duly authorized to make an acknowledgment within the meaning of section 19, explanation 2. An agency, within the meaning of that explanation, cannot be inferred from the mere fact that the person making the acknowledgment is a joint contractor. When a creditor deals, not with the managing member only of an undivided family, but with all the members of the family, as co-obligors, and on that footing enters into a transaction,—thereby avoiding any question as to whether the transaction was really for the benefit of the family,—he cannot rely upon an acknowledgment of the liability, made by one of them as an acknowledgment duly made on behalf of all the co-obligors by reason only that the person acknowledging is in fact the managing member of the family consisting of the co-obligors. There may, however, be cases in which that circumstance, coupled with the conduct of the joint contractors, may warrant the conclusion that, as a matter of fact, the managing member was duly authorized to make the acknowledgment on behalf of all. The three essentials of an English mortgage, as defined in section 58 (c) of the Transfer of Property Act, are (1) that the mortgagor should bind himself to repay the mortgage-money on a certain day, (2) that the property mortgaged should be transferred absolutely to the mortgagee, (3) that such absolute transfer should be made subject to a proviso that the mortgagee will reconvey the property to the mortgagor, upon payment by him of the mortgage-money on the day on which the mortgagor bound himself to repay same. A deed of mortgage recited that the mortgagors “herely mortgage and assign to the mortgagee” the mortgaged property. *Semble*, that (though it was doubtful if such an assignment was really an absolute one) the assignment was sufficient to fulfil the second requisite of an “English mortgage.” The proviso for reconveyance in the deed was as follows:—“Upon repayment to the mortgagee of all sums due to him by the mortgagors the mortgagee shall reconvey the said property to the mortgagors,” etc.—*Held*, (by the same Division Bench), that the transaction could not be regarded as an English mortgage, there being no words importing that the covenant to reconvey was dependent upon the repayment of the mortgage-money being made at the stipulated time and that it should not be enforced in default of repayment at that time. On the question what article of the Limitation Act governs a suit for sale by a mortgagee under such a mortgage deed.—*Held*, by the FULL BENCH, that the period of limitation was governed by article 147. That article applies to a suit by a mortgagee whether it is for foreclosure or sale, and, in the former case, whether the prayer in the plaint is for foreclosure alone, or is coupled with a prayer in the alternative for sale in lieu of a decree for foreclosure. *Ramachandra Rayaguru v. Modhu Padhi* (I.L.R., 21 Mad., 326), and *Gurwar Singh v. Thakur Narain Singh*, (I.L.R., 14 Cal., 730), dissented from.

Narayana Ayyar v. Venkataramana Ayya . . .

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2. —————, s. 85—*Appeal—Parties—Practice—Malabar law—Liability of improvements made by sub-tenants of kanomdar for rent due by kanomdar to jenmi* :

A jenmi having sued the kanomdar and his sub-tenants, obtained a decree for redemption and possession on certain terms. The sub-tenants, objecting to some of the terms, appealed, but they did not join the kanomdar, to whose prejudice the terms were modified on the appeal:—*Held*, that the kanomdar was a necessary party and that the decree made by the Appellate Court in his absence must be set aside, as no reasonable excuse was forthcoming for the omission to make him a party. *Ramunni Panikar v. Sankara Panikar*, (Second Appeal No. 1476 of 1889 (unreported)), and *Vedapuratti v. Govinda Menon*, (Second Appeal No. 51 of 1892 (unreported)), followed. Whether improvements made by sub-tenants of a kanomdar are liable for rent due by the kanomdar to the jenmi.—*Quære*. *Achuta v. Kalu*, (I.L.R., 7 Mad., 545) and *Eressa Menon v. Shamu Patter*, (I.L.R., 21 Mad., 138), referred to.

Vedapuratti v. Avara . . .

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3. _____, ss. 85, 96, 97—*Mortgagee holding two mortgages over same property—Suit for sale based on earlier mortgage alone—Maintainability:*

In 1880, B executed a simple mortgage over certain lands in favour of A. In 1886, B mortgaged the same lands to A with possession. A now brought a suit on the earlier mortgage for sale of the mortgaged property subject to the later mortgage:—*Held*, that the suit could not be maintained. *Sundar Singh v. Bholu*, (I.L.R., 20 All., 322), referred to.

Dorasami v. Venkateshayaar 108

4. _____, ss. 88, 89—*Application for order for decree absolute—Appeal—Civil Procedure Code—Act XIV of 1882, ss. 244, 310-A, 311, 540—Sale of mortgaged property in execution of mortgage-decree—Proceeding in execution:*

Sections 310-A and 311 of the Code of Civil Procedure apply to sales of mortgaged property in execution of mortgage decrees. *Kedar Nath Raut v. Kala Churn Ram*, (I.L.R., 25 Calc., 703), commented on. *Tirumal Rao v. Syed Dastaghiri Miyah*, (I.L.R., 22 Mad., 286), *Raja Ram Singha v. Chummi Lal*, (I.L.R., 19 All., 205), and *Krishnaji v. Mahadev Vinayak*, (I.L.R., 25 Bom., 104), approved. An appeal lies from an order passed upon an application made under section 89 of the Transfer of Property Act. *Per Sir ARNOLD WHITE, C.J., and MOOR, J.*—Such an order is not an order made in a proceeding in execution and is not appealable as such. It, however, has the effect of a final decree, and an appeal lies therefrom under section 540 of the Code of Civil Procedure. *Per DAVIES, BENSON and BHASHYAM AYYANGAR, JJ.*—An application made under section 89 of the Transfer of Property Act is, in effect, an application for execution of the decree passed under section 88, and an order made thereon is appealable under section 244 of the Code of Civil Procedure. *Ayudhya Peshad v. Baldeo Singh*, (I.L.R., 21 Calc., 818), and *Tana Prosad Roy v. Bhobodeb Roy*, (I.L.R., 22 Calc., 931), discussed.

Mullikarjunadu Setti v. Lingamurti Pantulu 244

5. _____, s. 89—*Order absolute for sale—Notice to defendant of application—Practice.*

Notice need not be given to a defendant before an order absolute for sale is made under section 89 of the Transfer of Property Act.

Krishna Ayyar v. Muthusami Ayyar 506

6. _____, s. 89—*Civil Procedure Code—Act XIV of 1882, s. 244—Execution of decree passed on usufructuary mortgage—Continuation of possession by mortgagees subsequently to decree—Claim to set off profits thus accrued from decree amount—Application for order absolute:*

By a decree passed on a compromise in a suit for the amount due under a mortgage, defendants were ordered to pay Rs. 770 to plaintiffs within a year, and in default of payment the amount was to be recovered by sale of the mortgaged and other property. By the terms of the mortgage, possession was given in lieu of interest, but the decree was silent as to possession and interest. Upon an application being made for execution of the decree by sale of the property referred to in it, the District Judge held that if the petitioners had continued in possession of the mortgaged property ever since the date of the decree, it would be necessary to take an account to ascertain whether the decree had been satisfied, and dismissed the petition:—*Held*, that such an order was wrong, inasmuch as it went behind the decree instead of executing it. *Held also*, that the application, in which the decree-holder stated that there had been default in payment of the decree amount and applied for sale, was an application for an order absolute for sale.

Appa Rao v. Krishna Ayyangar 537

7.	, s. 92—Decree for redemption— Omission to execute—Maintainability of subsequent suit on same mortgage— Res judicata—Civil Procedure Code—Act XIV of 1882, ss. 13, 244 :	PAGE
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Where a suit for redemption has been instituted and a decree for redemption has been passed therein, but not executed, a subsequent suit is not maintainable for the redemption of the same mortgage.

<i>Vedapuratti v. Vallabha Valiya Raja</i>	306
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USURY LAWS REPEAL ACT—ACT XXVIII OF 1855, s. 2—Contract Act—Act IX of 1872, s. 74—Contract Act Amendment Act—Act VI of 1899, s. 4—Penalty—Principal sum bearing no interest repayable by instalments—Provision for interest in case of default :
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Defendant was indebted to plaintiff, as the stake-holder of a "chit fund," and undertook to pay the amount of the principal by half-yearly instalments. He further undertook that, in case of default in the payment of such instalments, he would pay interest at the rate of one pie per rupee per diem from the date of default. No interest was payable on the principal sum unless default should be made, the instalments being in repayment of the principal sum alone without interest. Default having been made, plaintiff sued on the bond, whereupon defendant pleaded that the rate of interest was penal and not recoverable:—*Held*, that plaintiff was entitled to recover. The contract was not one which provided for the payment of a given rate of interest in any event and a higher rate in case of default. Under the agreement the debtor incurred no obligation to pay interest at all on the money which he owed. His liability to pay interest only arose in the event of default. The case was not governed, therefore, by the Contract Act of 1872, or the Contract Act Amendment Act of 1899. *Per Sir ARNOLD WHITE, C.J.*—Under the Contract Act of 1872, a stipulation that an enhanced rate of interest should be payable as from the date of default is not a stipulation by way of penalty. The explanation to section 4 of the Contract Act of 1899, which provides that a Court may treat such a stipulation as a penalty, is permissive and does not preclude it from holding otherwise. *Semble*, that the words "which is put in issue" in section 4 of the Contract Act of 1899, mean "which is in issue" and that where there is an appeal from a decree in a suit instituted in respect of a contract the contract is "in issue" in the appeal. Also, that the Contract Act of 1899 only applies to suits instituted after the commencement of that Act.

* <i>Sankaranarayana Vadhyar v. Sankaramarayana Ayyar</i>	343
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VILLAGE MAGISTRATE:—See CRIMINAL PROCEDURE CODE (5).

